Supreme Court, U.S.
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No. .....

In The

Supreme Court of the United States

October Term, 1985

SUZANNE LINDLEY DALY,

Petitioner,

vs.

NAN TOEWS DALY,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEVADA

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QUESTIONS PRESENTED FOR REVIEW

This petition presents the following questions requiring plenary consideration by this Court:

1. May the State of Nevada, consistent with the Due Process Clause of the Fourteenth Amendment, permanently and irrevocably terminate a parent's rights in her natural child without any showing of parental unfitness, and solely on the basis that the action is in the "best interests of the child," as those interests are subjectively conceived by the Nevada courts?

2. Is a Nevada statute which permits the complete and permanent termination of parental rights on the ground of "risk of serious physical, mental or emotional injury to the child if he were returned to, or remains in, the home of his parent," void for vagueness and therefore violative of the Due Process Clause of the Fourteenth Amendment?

3. May the State of Nevada, consistent with the guarantees of the Equal Protection Clause of the Fourteenth Amendment, irrevocably, completely and permanently deprive a person of the fundamental parental rights in her natural child solely because that parent suffered from a medical condition commonly known as transsexualism and received medically-authorized treatment for that condition?

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PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEVADA

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Petitioner Suzanne Lindley Daly prays that a Writ of Certiorari will issue to review the order and opinion of the Supreme Court of the State of Nevada which permanently and irrevocably terminated her rights as a natural parent.

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OPINIONS BELOW

The opinions of the Supreme Court of the State of Nevada were filed on March 6, 1986, and are published at 102 Nevada Advance Opinion 20, 715 P.2d 56. App. 1-20.

The trial court's written decision, findings of fact and conclusions of law and judgment upheld by the Nevada Supreme Court, are reproduced in the Appendix at pages 21-38.

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JURISDICTION

The judgment of the Supreme Court of Nevada was filed on March 6, 1986. By order dated May 21, 1986, Circuit Justice Rehnquist extended the time for filing this petition for writ of certiorari to and including July 3, 1986.

The jurisdiction of the Supreme Court of the United States is based on 28 U.S.C. § 1257, subdivision (3).

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CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The Fourteenth Amendment to the United States Constitution states in relevant part: "[N]or shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

The Nevada Statutes involved in this case are reproduced in the Appendix at pages 39-44.

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STATEMENT OF THE CASE

Narrowmindedness has triumphed over reason in this tragic case. Shockingly, petitioner Suzanne Lindley Daly's courageous decision to obtain sex reassignment surgery—the only known treatment for the recognized medical condition known as gender dysphoria (commonly, transsexualism)—has resulted directly in the permanent and irrevocable termination of her fundamental parental rights with respect to Mary Toews Daly, her only child.

Suzanne was diagnosed as gender dysphoric in 1981.[1] Despite the burden of the disorder, she led an exemplary life as Tim Daly, which she continues as Suzanne Daly.[2] After high school, she received an appointment to the United States Naval Academy at Annapolis, but could not attend because of poor eyesight. Instead, she enlisted in the United States Army and served honorably. She was educated at the University of California at Berkeley and received degrees in both Anthropology and Slavic Languages and Literatures and worked at the Lawrence Berke-

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[1] A transsexual, or a person with gender dysphoria, "has a core identity contradictory to that designated by genital anatomy." Green, *Sexual Identity of 37 Children Raised by Homosexual or Transsexual Parents*, 135 Am. J. Psychiatry 692, 692 (1978). We refer to Suzanne as a former transsexual because, after the medical procedures are completed, a candidate for sex reassignment surgery is properly referred to as a former transsexual. See generally Comment, *M.T. v. J.T.: An Enlightened Perspective on Transsexualism*, 6 Cap. U.L. Rev. 403, 403-10 (1976-1977); Comment, *The Law and Transsexualism: A Faltering Response to a Conceptual Dilemma*, 7 Conn. L. Rev. 288, 288-94 (1974-1975); Comment, *Transsexualism, Sex Reassignment Surgery, and the Law*, 56 Cornell L. Rev. 963, 965-72 (1970-1971).

[2] Her name was legally changed to Suzanne Lindley Daly in December 1982, and she is legally a woman under the laws of California. II ROA 3, 301. For consistency, we use feminine pronouns in discussing Suzanne's life both before and after her surgery.

ley Laboratory. Following graduation, she continued to work at that lab, where she continues today to make her career as a scientific research specialist, designing and building complex research equipment and experimental devices. II ROA 125, 128-30, 133-36, 301-03.

Suzanne married respondent Nan Toews Daly in Oakland, California on September 17, 1969. Their only child, Mary Toews Daly, was born on August 21, 1973.

On March 6, 1986, some thirteen years later, the Nevada Supreme Court—by a narrow majority and over a strong dissent—affirmed a trial court decision extinguishing Suzanne's parental rights in her child; as a result, Suzanne is now forever deprived of the fundamental right to be Mary's parent.

The parties lived as a family in Oakland, California throughout their marriage. When they separated in August 1978, respondent moved with Mary from Oakland to Reno, Nevada. Suzanne traveled to Reno to visit with her child regularly every four to six weeks. II ROA 9, 21. On these visits, Suzanne would sometimes bring kits which she and her child would assemble together, and sometimes she would bring books to read. II ROA 22-23.

In May 1979, Suzanne asked respondent for a divorce. II ROA 23-24. The Nevada district court entered its judgment and decree of divorce on February 17, 1981, granting respondent custody of Mary with visitation rights to Suzanne. I ROA 55. After the divorce, Suzanne continued to visit with her child even though the hostility between the parents was intense. During a month-long visit by Mary to Oakland in August 1981, in the same home where Mary was born and had lived with her parents until their

separation, Suzanne carefully explained to and shared with Mary her plans for her own life. II ROA 343.

It was during this very visit with her child that Suzanne first used the word "transsexual" to identify herself, though she had long been exploring that aspect of her personality. II ROA 322. Indeed, she had resisted accepting herself by that term largely because of her strong parental love and consideration for Mary which, up to that point, had prevented her from seeking the medical attention she needed. II ROA 322-23. But now, she knew she "didn't want to lie to anyone, and above all, [she] didn't want to lie to [her]self." *Id.*

Suzanne explained to her child in various conversations some of what she had learned about herself. She explained that she would be "changing" because she was a transsexual, and she told Mary how she felt about herself. II ROA 322, 323, 324, 343. After many discussions, Suzanne felt not only that Mary had understood what was being shared with her but also that Mary was pleased Suzanne had confided in her about something so important. II ROA 344, 345. Because Suzanne believed respondent and Mary's maternal grandmother would "use it against" Suzanne, she suggested to her daughter that she not tell them about their private discussions. II ROA 348.

Mary continued to visit with Suzanne in Oakland after these discussions. They visited in October 1981 and again in January 1982, and Suzanne noticed no difference between her child's demeanor during this period and the preceding twelve-month period. II ROA 242, 346.

Mary revealed her father's medical condition and plans to respondent in February 1982; since that time,

Suzanne has been totally barred from seeing her child. II ROA 28. That is, respondent has prevented Suzanne from visiting with her child for the past four-and-one-half years, solely because Suzanne was transsexual. II ROA 222.

When Suzanne attempted to visit Mary in Reno in February 1982, respondent had armed sheriffs chase her away even though there was no court order preventing the visitation, which was pursuant to the divorce and custody decree. II ROA 225. Then, in August of 1982, respondent refused to pick up Suzanne's birthday present for Mary at the post office. II ROA 229-31. She also instructed Suzanne not to telephone Mary. One day in January 1983, respondent prevented Suzanne from reaching Mary by invoking a non-existent court order; later that same day, Mary's maternal grandmother chased Suzanne away at rifle point, putting an end to Suzanne's final futile attempt to make contact with Mary. II ROA 228-31.

On May 12, 1982, respondent filed a petition in Nevada District Court for an order terminating Suzanne's rights as a parent, pursuant to Nevada Revised Statute 128.105. Although she failed to set forth any facts at all to justify such a drastic step, respondent claimed in her verified petition that Suzanne was unfit to be a parent and that there was a risk of serious physical, mental or emotional injury to the child if she were allowed to visit with Suzanne.

The two-day trial in these proceedings took place on February 22 and 23, 1983. Respondent dredged up grievances from before the divorce and made accusations of non-support and abandonment which were audacious in light of the Iron Curtain she had erected between Mary and

Suzanne; but these accusations were merely peripheral to her crusade.[3] Rather, the termination proceedings were unmistakably a referendum on transsexualism. Respondent cast Suzanne as the heretic, flatly testifying that she petitioned to extinguish Suzanne's parental status because of her personal belief that it was unhealthy and unnecessary for Mary to deal with the fact that her father is now a woman. In respondent's view, "Mary's father doesn't exist anymore." II ROA 263.

Respondent could not marshall much evidence to support her views. Dr. Richard Weiher, a psychologist who examined Mary for one hour, less than three weeks before the trial, testified on behalf of respondent that Mary is "probably about as happy as most other nine-year-olds," and is developing well within normal limits. II ROA 49. The clear thrust of Weiher's testimony was that *visitation* between Suzanne and Mary should perhaps not be reinstated as of the time of trial, but that any parent-child problem ultimately could best be corrected by evaluation of Suzanne's emotional stability to see if she is "capable of exercising good and consistent judgment," followed by

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[3] The trial court ignored these grounds in its findings of fact and conclusions of law, as well as in its decision, specifically noting that Suzanne "has been denied any contact with Mary." App. 22, 30. In addition, Suzanne's trial counsel impeached much of respondent's testimony regarding support. *E.g.*, II ROA 194-221. Further, to dispel any remaining suggestion of abandonment or non-support, the dissenting members of the Nevada Supreme Court noted that Suzanne "was attempting to regain visitation rights during this same period," but "was hindered by counsel who evidently did not expeditiously aid [her] cause." The dissent cogently concluded, "Where a parent attempts through an attorney to regain his rights, we obviously should not hold that he has abandoned his child merely because of the seemingly ineffective assistance of counsel." App. 16, n. 4.

counseling to bring Suzanne, Mary and the natural mother "together." II ROA 64-65. Indeed, he testified that counseling would be as good a resolution as terminating visitation with Suzanne. II ROA 70. Weiher felt, however, that *respondent* was not "willing to go to these lengths and try and effect some sort of reconciliation [even] if it would be in Mary's best interest." II ROA 67.

Respondent testified that Mary told her in February 1982 that Suzanne was a transsexual. II ROA 28. She testified that Mary told her to sit down, took "the role of a mother," patted her hands, and said "Mom, you know dad and his long hair, well, he is a transsexual." II ROA 28-29. Respondent described Mary's attitude at that time as not that of a nine-year-old, but as being "very mature":

> "She was being my mother. She was holding my hands. She was patting my hands. She was telling me in a very calm voice that dad is a transsexual." *Id.*

In hindsight, respondent noticed that Mary had changed after she returned from the summer visit with Suzanne—for example, she was "hyper" and she wet the bed. II ROA 31. Her handwriting purportedly "degenerated into a scrawl"[4] and she seemed somehow inattentive. II ROA 32. She felt that these changes in Mary, a certified academically-talented child since age 7, stemmed entirely from Suzanne's change and the fact that Suzanne confided in the child. Neither Mary's teacher nor her next-door-neighbor, however, noticed any changes in Mary's behavior during this period. II ROA 84, 92-93.

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[4] No samples were produced to substantiate this claim.

Dr. Ira Pauly, psychiatrist and internationally-recognized specialist in gender identity disorders, testified on Suzanne's behalf. II ROA 93. Dr. Pauly testified that transsexualism is a gender disorder in which the "biological identity of the individual is inconsistent with the gender identity . . . [h]is genetic anatomical [identity] being male on one side, and his psychological identity being female on the other hand." II ROA 114. He explained that there is *only one* known treatment for the condition: careful evaluation for no less than six months, followed by the "Real Life Test," in which the patient is encouraged to live in the gender of his preference (so a man who feels he was born into the wrong body lives as a woman), concurrent with no less than twelve months of hormone therapy, and finally sex reassignment surgery. II ROA 96, 99. He testified that people do "extremely well with this [medical] procedure." II ROA 99. As to the impact of gender dysphoria on parent-child relationships, Pauly explained that "the bottom line is, if the child has felt himself to be loved by this person, I think he can accept the rather traumatic transformation, as long as he feels that he will continue to get love and support from his biological parent." II ROA 110-11. He said that "there ought to be ways of assessing one's parent capability, even if they happen to be caught up with a very complicated problem known as transsexualism," because there is nothing about "the issue of transsexualism, per se," which will affect the parent-child relationhip. II ROA 113.

At closing, Suzanne reminded the trial court of her fundamental right to be Mary's parent. III ROA 19. The point was buried, however, in the hysteria of respondent's

summation, in which Suzanne was labeled a "pervert." III ROA 4. Respondent asserted Suzanne "is selfish," that she "is not normal," that she "has a disturbed sense of values," and that her lifestyle is "completely alien to society." III ROA 4, 5, 8. She characterized Suzanne's longing to have Mary know, understand and accept her for what she is as "brainwashing," and "playing games with Mary's mind."[5] III ROA 6, 7. In respondent's twisted characterization, Suzanne was "preying on" Mary, simply by seeking to know and be known by her. III ROA 7.

Based on the meager facts presented to it, the trial court somehow found it appropriate to extinguish Suzanne's parental rights in Mary. In ordering the termination of this precious fundamental right, the trial court found that Suzanne had been denied any contact with Mary by respondent for over a year, but that the "dominant purpose" of the proceedings to terminate Suzanne's rights as a parent was to assess the "best interests of the child," which the court felt somehow were best served by ending the parent-child relationship altogether. I ROA 55-61.

Suzanne appealed the trial court's judgment to the Supreme Court of Nevada. I ROA 66. There, her counsel argued, among other issues, that Suzanne was denied due process and equal protection under the Fourteenth Amendment to the United States Constitution and that the Nevada parental termination statutes are void because they

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[5] Since by the time of trial respondent had convinced Mary that her father "doesn't exist any more" and "is dead," this last charge is surely an egregious case of the pot calling the kettle black. II ROA 263.

are unconstitutionally vague. App. 50-72. In affirming the trial court's judgment, the Nevada Supreme Court chose not to address the constitutional issues raised, except for a summary dismissal of Suzanne's equal protection argument, but ruled that on the record it reviewed, the lower court's decision was entitled to due deference. Three members of the court then affirmed the lower court's judgment. Without addressing the constitutional issues raised, a two-member dissent recognized that the majority's decision was premised solely on its prejudices regarding Suzanne's medical condition and stated that the decision to terminate Suzanne's parental rights could not properly be premised on the potential effects of visitation rights. The dissent observed that on the record it reviewed there was no adequate basis upon which to terminate Suzanne's parental rights in Mary, her only child.

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REASONS FOR GRANTING THE WRIT

I.

THE STATE OF NEVADA HAS VIOLATED PETITIONER SUZANNE DALY'S RIGHTS GUARANTEED UNDER THE FOURTEENTH AMENDMENT'S DUE PROCESS CLAUSE BY PERMANENTLY DEPRIVING SUZANNE OF HER FUNDAMENTAL RIGHTS AS A NATURAL PARENT WITHOUT A SHOWING OF PARENTAL UNFITNESS AND SOLELY BECAUSE OF A BELIEF THAT SUCH DRASTIC ACTION WAS IN HER CHILD'S "BEST INTERESTS," AS THOSE INTERESTS WERE CONCEIVED BY THE NEVADA COURTS.

The Nevada Supreme Court terminated Suzanne Daly's fundamental rights as a natural parent without ei-

ther evidence of, or any determination that, she is unfit to be her daughter's parent. Instead, that court's decision, like that of the trial court it affirmed, was premised entirely upon the belief that for Suzanne to continue visiting with her natural child would not be in the child's "best interests." Such an irrational and drastic interference with Suzanne's fundamental rights patently violates the Due Process Clause of the Fourteenth Amendment.

This Court has long recognized that "freedom of personal choice in matters of family life is a fundamental liberty interest protected by the Fourteenth Amendment." *Santosky v. Kramer,* 455 U.S. 745, 753 (1982) (and cases cited therein). "This Court's decisions have by now made plain beyond the need for multiple citation that a parent's desire for and right to 'the companionship, care, custody and management of his or her children' is an important interest that 'undeniably warrants deference and, absent a powerful countervailing interest, protection.'" *Lassiter v. Department of Social Services,* 452 U.S. 18, 27 (1981) quoting *Stanley v. Illinois,* 405 U.S. 645, 651 (1972). "A parent's interest in the accuracy and injustice of the decision to terminate his or her parental status is, therefore a commanding one." *Id.* (footnote omitted).

In *Quilloin v. Walcott,* 434 U.S. 246 (1978), this Court unanimously declared that the State cannot, consistent with principles of due process, interfere with a natural parent's fundamental right to be a parent absent a showing of parental unfitness, and may not premise the judicial dismemberment of a family solely on a determination that that result may be in the child's best interests, as those interests are assessed by the State. "We have little doubt

that the Due Process Clause would be offended '[i]f a State were to attempt to force the breakup of a natural family, over the objections of the parents and their children, without some showing of unfitness and for the sole reason that to do so was thought to be in the children's best interest.'" *Id.* at 255 (quoting *Smith v. Organization of Foster Families*, 431 U.S. 816, 862-63 (1977) (Stewart, J., concurring in judgment)). For the State to terminate an individual's parental rights based solely upon its own predilections as to what are the "best interests of the child"—without any determination regarding the parent's fitness as a parent—smacks of totalitarianism at its most pernicious. Thus, thirteen years ago this Court recognized that "as a matter of due process of law, [a parent is] entitled to a hearing on his *fitness* as a parent before his children [are] taken from him . . . ." *Stanley v. Illinois*, 405 U.S. 645, 649 (1972) (emphasis added). More recently, in *Santosky*, this Court observed that a judgment terminating parental rights necessarily "entails a judicial determination that the parents are *unfit* to raise their own children." *Santosky*, 455 U.S. at 760 (emphasis supplied).

A determination to invade a parent's fundamental interest in a natural child without some finding of parental fault, but solely because such a determination is thought to be in the child's best interests, allows the interference with a precious liberty interest to be based upon the judge's subjective belief system rather than objective evidence. Indeed, "[t]his court more than once has adverted to the fact that the best interests of the child standard offers little guidance to judges, and may effectively encourage them to rely on their own personal values."

Lassiter v. Department of Social Services, 452 U.S. 18, 46, n. 13 (Blackmun, J., dissenting). As one knowledgeable commentator has pointed out, "a careful review of case law and literature strongly indicates that the [best interest of the child] terminology has been construed and deliberated to such a degree as to have reduced its judicial meaning to total subjectivity without delineation." Levine, *Foundation for Drafting a Model Statute to Terminate Parental Rights: A Select Bibliography,* 26 Juv. Just. 42, 43 (August 1975).[6]

Even though the Nevada Supreme Court had previously acknowledged that Nevada could not constitutionally terminate a parent's "sacred liberty right of parenthood unless such unfitness is shown to be severe and persistent and such as to render the parent *unsuitable* to maintain the parental relationship," *Champagne v. Welfare Division,* 100 Nev. 640, 648, 691 P.2d 849, 855 (1984) (footnote omitted, original emphasis), in this case both the trial court and the Nevada Supreme Court simply lost sight of the necessity of this fundamental constitutional protection. The trial court's decision and findings of fact and conclusions of law are not premised on any finding of parental unfitness.[7] Rather, that court's written decision makes plain that the court terminated Suzanne's funda-

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[6] See, e.g., *In re McDonald* — Iowa —, 201 N.W.2d 447 (1972) [court terminated parental rights of parents whose IQs were lower than their children's solely on the ground that the children did not receive proper intellectual stimuli].

[7] The Legislature has defined an "unfit parent" as "any parent of a child who, by reason of his fault or habit or conduct toward the child or other persons, fails to provide such child with proper care, guidance and support." NRS 128.018, App. 39-40.

mental rights solely because of its own conception of Mary's "best interests." Thus, the court observed that,

> "[T]he polar star of termination proceedings is the best interests of this child only. The issue presented is to determine whether Suzanne Lindley Daly's parental rights to Mary should be terminated, giving due consideration to her rights as a natural parent, but with the dominant purpose of serving the best interests of the minor child." App. 22, 31.

Indeed, the trial court's *only* reference to unfitness was the following observation, a thinly-disguised expression of the court's prejudices:

> "If the natural father is not capable for whatever reason to be a father for the child within the minimal acceptable standards, he is to be deemed unfit, unstable, or unqualified to have reasonable visitation rights as deemed not the best interests of the child or for the child's welfare." App. 24, 33.[8]

Thus, as the trial court explained, its decision to extinguish permanently Suzanne's parental rights was clearly based on its belief that such drastic action was in the child's best interest, not upon any finding that Suzanne was unfit to raise her child.

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[8] The trial court's fixation on visitation was echoed in the Nevada Supreme Court's majority opinion. Indeed, the majority's obsession with visitation consumes its decision, for in its short opinion, the majority refers to visitation on no less than fifteen separate occasions. But, of course, as the Supreme Court dissenters pointed out, that issue was a red herring and had no business being considered in these proceedings. Because the statutory scheme governing parental termination proceedings is so vague that it allows a trial court to ground its termination decision on whether or not visitation is in the child's best interests, the statute is unconstitutional. See Issue II, below.

The majority opinion of the Nevada Supreme Court also elevated its conception of the child's "best interests" above Suzanne's rights as a parent, conceding that its decision was not premised on any determination of parental unfitness. The majority observed that "[i]t must be remembered that in termination proceedings, the *interests of the child are paramount* and a child should not be forced to undergo psychological adjustments, especially in view of the risk involved, *solely to avoid termination of a parent's rights.*" App. 5-6 (emphasis added). As in the trial court, the thrust of the court's decision rests on its belief that visitation with Suzanne is not in the child's best interests. The majority admits that the trial court did not conclude that Suzanne was an unfit parent. Nonetheless, the majority condones the trial court's decision and concludes that the "effect [visitation] had upon Mary" left it no alternative but to terminate Suzanne's parental rights. App. 5, n. 4.[9]

In spite of this Court's clear recognition that due process requires that termination of a parent's natural rights must be premised on a finding of parental unfitness, not just State authorities' concepts of the child's "best interests," Nevada terminated Suzanne's fundamental parental rights in her natural child solely because the Nevada courts determined that visitation with a parent suffering from gender dysphoria was incompatible with their notion of the

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[9] There is nothing in the record to support the majority's suggestion that the trial court determined that Suzanne abandoned her child. The evidence showed, and the trial court expressly found, that Suzanne was *denied* contact with her child for the twelve months preceding the hearing; thus, as the dissent astutely noted, there was no basis for the conclusion that Suzanne evinced a "settled purpose . . . relinquishing all claims to the child." NRS 128.012(1).

child's "best interest"—notwithstanding the utter lack of evidence of parental unfitness. Accordingly, petitioner Suzanne Daly has been denied her fundamental right to parenthood guaranteed by the Due Process Clause of the Fourteenth Amendment.

II.

NEVADA REVISED STATUTE 128.105, SUBDIVISION (4) OF NEVADA'S PARENTAL TERMINATION STATUTES IS UNCONSTITUTIONALLY VAGUE, AND THEREFORE OFFENSIVE TO THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT.

NRS 128.105 provides six considerations upon which an order terminating parental rights may be based. These considerations relate "to parental conduct or incapacity and the parent's suitability as a parent." *Champagne v. Welfare Division*, 100 Nev. 640, 646, 691 P.2d 849, 854 (1984) (footnote omitted). That is, this portion of the Nevada parental termination statutes describes the "specific fault or condition directly related to the parents" which comprises the jurisdictional grounds for termination. *Id.* NRS 128.105, subdivision (4), states that one such condition is "[r]isk of serious physical, mental or emotional injury to the child if he were returned to, or remains in, the home of his parent or parents." As the Supreme Court of Nevada recognized, it was this subsection upon which the trial court purported to base its decision to extinguish Suzanne Daly's fundamental rights as a parent. That court determined that the trial court's primary focus was "upon the risk of serious physical, mental or emotional injury to the child if visitation were resumed and the child were forced to maintain contact

with [Suzanne Daly]. NRS 128.105(4)." App. 4-5. On its face, this subdivision is unconstitutionally vague within the meaning of the due process clause of the Fourteenth Amendment because it fails to clarify what type of parental fault or conduct may result in a risk of harm to the child.

Because this subsection provided no fair warning to Suzanne Daly of the type of conduct which would subject her to the application of the statute, and because the statute is subject to arbitrary application and, in the instant case, arbitrarily interfered with Suzanne's fundamental rights as a parent, the statute is unconstitutionally vague in violation of the Due Process Clause.

This Court has determined that a civil statute is unconstitutionally vague when it arbitrarily deprives a citizen of a liberty interest as guaranteed under the Constitution. *Giaccio v. Pennsylvania*, 382 U.S. 399, 402 (1966). That is precisely what has occurred here. Relying upon this statute, the courts of Nevada have deprived Suzanne of her fundamental liberty interest—her status as a parent. Thus, NRS 128.105, subdivision (4) must "meet the challenge that it is unconstitutionally vague." *Id.*

"Vague statutes . . . carry three dangers: the absence of fair warning, the impermissible delegation of discretion, and the undue inhibition of the legitimate exercise of a constitutional right." *Alsager v. District Court*, 406 F.Supp. 10, 18 (S.D. Iowa 1975), *aff'd on other grounds*, 545 F.2d 1137 (8th Cir. 1976). All three of these dangers are present in NRS 128.105, subdivision (4).

First, NRS 128.105, subdivision (4) gives absolutely no warning of the type of conduct it seeks to control. The

statutory language is "susceptible to multifarious interpretations which prevent the ordinary person from knowing what is and what is not prohibited." *Alsager*, 406 F.Supp. at 18. That is, as could happen under the similarly worded and unconstitutionally vague statute at issue in *Alsager*, "a parent might follow a rigid scheme of 'discipline-instilling' corporal punishment believing himself in full compliance with the law, only to learn of his folly at a termination proceeding." *Ibid.*, (footnote omitted). Or, as the statute was interpreted in this case, a parent like Suzanne might undergo medically approved sex reassignment surgery without any warning that the medical procedure would someday be used against her to extinguish forever her cherished right of parenthood. Thus, this subdivision "trap[s] the innocent by not providing fair warning." *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972).

Second, this subdivision confers upon state officials and courts so much discretion in interpreting and applying the statute that it encourages arbitrary and discriminatory parental terminations. Any conceivable conduct is susceptible to classification by the Nevada courts as involving a "risk of serious harm." This is so because the state judges in Nevada are afforded the discretion to determine not only what is a "risk of harm," but also whether the supposed risk is serious enough to require termination of parental rights. "The termination of the parent-child relationship in any given case may thus turn upon which state officials are involved in the case, rather than explicit standards reflecting legislative intent. This danger is especially grave in the highly subjective context of determining an approved mode of child rearing." *Alsager*, 406 F.Supp. at 18-19.

This Court has recently observed that "[a]lthough the [vagueness] doctrine focuses both on actual notice to citizens and arbitrary enforcement, we have recognized recently that the more important aspect of the vagueness doctrine 'is not actual notice, but the other principal element of the doctrine—the requirement that a legislature establish minimal guidelines to govern law enforcement.' " *Kolender v. Lawson,* 461 U.S. 352, 357-58 (1983) (quoting *Smith v. Goguen,* 415 U.S. 566, 574 (1974)). Thus, a statute such as the one at issue here, which fails to provide any minimal guidelines, permits "a standardless sweep [that] allows [judges] to pursue their personal predilections." *Id.* at 358 (citations omitted).

" 'In evaluating a facial challenge to a state law, a federal court must, of course, consider any limiting construction that a state court or enforcement agency has proffered.' " *Id.* at 355 (quoting *Hoffman Estates v. Flipside, Hoffman Estates Inc.,* 455 U.S. 489, 494, n.5 (1982)). If the Nevada courts have established standards and guidelines in interpreting the statute, the vagueness may have been cured. However, the Nevada decisions have utterly failed to provide any consistent construction of this subsection. Thus, in *Champagne v. Welfare Division,* 100 Nev. 640, 691 P.2d 849 (1984), the Nevada Supreme Court suggested this subsection meant "substantial child abuse," while in the present case the statute was construed to mean "visiting a parent who had undergone medically approved sex reassignment surgery."

Since NRS 128.105(4) fails to provide fair warning to those against whom it may be exercised, permissibly delegates discretion in its interpretation and application, and undeniably inhibits legitimate exercise of a most precious

constitutional right, the statute is unconstitutionally vague and in violation of the Due Process Clause of the Fourteenth Amendment.

III.

THE STATE OF NEVADA HAS DEPRIVED SUZANNE DALY OF EQUAL TREATMENT UNDER THE FOURTEENTH AMENDMENT'S EQUAL PROTECTION CLAUSE BY IRREVOCABLY, COMPLETELY AND PERMANENTLY DEPRIVING SUZANNE OF HER FUNDAMENTAL RIGHTS AS A NATURAL PARENT SOLELY BECAUSE SHE SUFFERED FROM AND WAS TREATED FOR A MEDICAL CONDITION COMMONLY KNOWN AS TRANSSEXUALISM.

As previously discussed, this Court "historical[ly] recogni[zed] that freedom of personal choice in matters of family life is a fundamental liberty interest protected by the Fourteenth Amendment." *Santosky v. Kramer*, 455 U.S. 745, 753 (and cases cited therein). Indeed, a parent's rights in her natural child are rights "far more precious . . . than property rights." *Stanley v. Illinois*, 405 U.S. 645, 651 (1972) (quoting *May v. Anderson*, 345 U.S. 528, 533 (1953)). The Nevada courts have completely and irrevocably extinguished Suzanne Daly's precious parental rights solely because Suzanne has suffered from and been treated for a medical condition commonly known as transsexualism. This drastic and permanent action by the Nevada courts has denied Suzanne her right to equal treatment under the law in violation of the Equal Protection Clause of the Fourteenth Amendment.

"The concept of equal justice under the law requires the State to govern impartially." *Lehr v. Robertson*, 463 U.S. 248, 265 (1983). By permanently terminating Su-

zanne's fundamental parental rights because she suffered from a gender disorder for which she has been fully and effectively treated, the Nevada courts have created an entirely irrational classification vis-a-vis the rights at issue. The plain effect of the ruling of the Nevada courts is to create and treat unequally two similarly situated classes: parents who are suffering from the medical condition known as transsexualism and all other parents.

As this Court has recognized, "[w]e have long been mindful that where fundamental rights and liberties are asserted under the Equal Protection Clause, classifications which might invade or restrain them must be closely scrutinized and carefully confined." *Harper v. Virginia State Board of Elections*, 383 U.S. 663, 670 (1966). In strictly scrutinizing court actions where invidious discrimination results in a classification which invades a fundamental right, " 'the purpose of the restriction and the assertedly overriding interests served by it must meet close constitutional scrutiny.' " *Dunn v. Blumstein*, 405 U.S. 330, 336 (1972) (quoting *Evans v. Cornman*, 398 U.S. 419, 422 (1970)). Furthermore, "if a challenged [court ruling] grants the right [to parenthood] to some citizens and denies the [right] to others, 'the Court must determine whether the exclusions are *necessary* to promote a *compelling* state interest.' " *Id.* at 337 (citations omitted, original emphasis). Nevada's actions simply cannot survive these tests.

No state interest, much less a compelling one, justifies the termination of parental rights based solely upon the parent's status as a former transsexual. Not only was there no evidence that anything about gender dysphoria would render an individual unfit to be a parent, the evidence was to the contrary: Dr. Pauly testified that there was

nothing in the condition of transsexualism which would, by itself, disqualify an individual from being a fully effective and loving parent. Moreover, the state's interest in parental rights termination proceedings is "a *parens patriae* interest in preserving and promoting the welfare of the child." *Santosky v. Kramer,* 455 U.S. at 766. This interest "favors preservation, not severance, of natural familial bonds." *Id.* at 766-67 (footnote omitted). Thus, the "State registers no gain towards its declared goals when it [terminates parental rights]." *Stanley v. Illinois,* 405 U.S. at 652.[10]

"[I]f there are other, reasonable goals with a lesser burden on constitutionally protected activity, a State may not choose the way of greater interference. If it acts at all, it must choose less drastic means." *Dunn v. Blumstein,* 405 U.S. at 343 (citation omitted). The record indicates, as the dissenting Nevada Supreme Court justices pointed out, that there is a far less drastic means for the courts to achieve some harmony in this child's life. Counseling to attempt to bring the family together was the clear preference of both experts at the hearing. Certainly, this means of resolving any strife among the family members is less drastic and more humane than erasing a parent.

That, out of ignorance, respondent dislikes and despises Suzanne's condition is certainly clear from the record. "The question, however, is whether the reality of private biases and the possible injury they might inflict are permissible consideration for [permanent termination] of

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[10] Indeed, "if [Suzanne] is a fit parent, the State spites its own articulated goals when it needlessly terminates [her rights in her natural child]." *Stanley v. Illinois,* 405 U.S. at 653.

an infant child from . . . its natural [parent]." *Palmore v. Sidoti*, 466 U.S. 429, 104 S.Ct. 1879, 1882 (1984). As Chief Justice Burger said, writing for a unanimous Court:

> "The Constitution cannot control such prejudices but neither can it tolerate them. Private biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect. 'Public officials sworn to uphold the Constitution may not avoid a constitutional duty by bowing to the hypothetical effects of private . . . prejudice that they assume to be both widely and deeply held.'" *Id.* (quoting *Palmer v. Thompson*, 403 U.S. 217, 260-61 (1971) (White, J., dissenting)).

Suzanne Daly's fundamental parental rights were permanently severed because of an invidious classification based entirely upon her gender identity disorder. As a result, Suzanne has been denied equal treatment as guaranteed under the Equal Protection Clause of the Fourteenth Amendment.

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CONCLUSION

Suzanne Lindley Daly's fundamental rights as a parent of her natural child were irrevocably, permanently, and completely extinguished by the Nevada Supreme Court, in violation of the Due Process Clause and the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. Only this Court can correct this unconsitutional state court action. Accordingly, this Honor-

able Court should grant Suzanne Daly's Petition for Writ of Certiorari to the Supreme Court of the State of Nevada.

Respectfully submitted,

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APPENDIX

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IN THE SUPREME COURT OF THE
STATE OF NEVADA

SUZANNE LINDLEY DALY, Formerly Known as TIM DALY, Appellant *v.* NAN TOEWS DALY, Respondent.

No. 15423

March 6, 1986

Appeal from a district court's order terminating appellant's parental rights. Second Judicial District Court, Washoe County; John E. Gabrielli, Judge.

Affirmed.

Ann Casamajor, Albany, California, and *Semenza & Brown,* Reno, for Appellant.

Nada Novakovich, Reno, for Respondent.

OPINION

By the Court, STEFFEN, J.:

Appellant, a transsexual, contends that there is no legal basis for the order terminating her parental rights and that the lower court is merely and improperly enforcing the private prejudices of the respondent. Palmore v. Sidote, 104 S.Ct. 1879 (1984). We have considered the arguments presented by counsel, carefully reviewed the record and conclude that the district court ruled correctly and should be affirmed.

Respondent Nan Daly is the natural mother of the child. Appellant Suzanne Daly is the natural father of

the child. Appellant's name was changed from Tim Daly on December 9, 1982. Appellant underwent sex-reassignment surgery, changing her sexual anatomy from male to female, on December 13, 1983, after a trial period of living as a female for approximately one year.

The parties were married September 17, 1969, at Oakland, California. The minor child at issue in this action, Mary Toews Daly, was born August 21, 1973, at Oakland. A final decree of divorce was entered February 17, 1981, at Reno, Nevada, in the Second Judicial District Court. Respondent was awarded custody and control of Mary, subject to the visitation rights of appellant. Initially, appellant regularly exercised visitation rights under the decree, seeing the child approximately one weekend per month, alternate holidays and one month in the summer of 1981.

While Mary was with appellant in August, 1981, appellant revealed that she was a transsexual and would be undergoing hormonal and surgical reassignment as a female under the care of medical professionals.[1] Appellant told Mary that neither respondent nor her grandmother, who lives with respondent, should know of appellant's plans. Mary did not reveal appellant's intentions for six months.

When Mary returned from her visit to Oakland in August of 1981, respondent noticed she was withdrawn and afraid to tell her something. On February 14, 1982,

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[1]Soon thereafter, Suzanne introduced Mary to the community of alternate lifestyles by taking her to a session at the Pacific Center where other transsexuals gather for support and counseling and discuss their experiences with one another.

Mary revealed her father's plans to her mother. Mary was taken to a psychologist and evaluated by Dr. Towle, who advised respondent that it was very dangerous to allow Mary to be in the company of her father again.

Respondent testified that when Mary returned from the August visitation with her father, she would vacillate from being wide awake to being very sluggish. A certified academically talented child since seven years of age, she would sit at the kitchen table for hours cutting a large piece of paper into small pieces. She would take a pencil and trace the grain of the oak floor for hours. She wet the bed and, in fact, was incontinent in class a week prior to trial. Mary had not wet the bed since she was two years old. She had a short attention span and could not follow instructions, nor perform simple tasks. She also became inattentive and her handwriting degenerated into a scrawl. In addition, Mary became quiet and withdrawn.

In May of 1982, the respondent mother petitioned the lower court to terminate appellant's parental rights. On April 11, 1983, the court rendered its decision terminating appellant's parental rights. Appellant thereafter appealed.

In Carson v. Lowe, 76 Nev. 446, 357 P.2d 591 (1960), this Court recognized its duty to scrutinize the termination of parental rights. Moreover, this Court in Cloninger v. Russell, 98 Nev. 597, 655 P.2d 528 (1982), adopted the clear and convincing evidence standard of proof in parental rights termination proceedings as set forth in Santosky v. Kramer, 455 U.S. 745 (1982). NRS 128.110 authorizes the termination of parental rights upon finding grounds pursuant to NRS 128.105. In the recent decision

of Champagne v. Welfare Division of the Nevada State Department of Human Resources, 100 Nev. 640, 691 P.2d 849 (1984), we elaborated on the grounds set forth in NRS 128.105 and held that there must be a finding of both jurisdictional and dispositional grounds in order to justify issuance of a termination order. Our review of the evidence in the instant case persuades us that both grounds were satisfied.

JURISDICTIONAL GROUNDS

NRS 128.105[2] specifies the jurisdictional grounds for termination. The district court primarily focused upon the risk of serious physical, mental or emotional injury to the

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[2]NRS 128.105 recognizes the following jurisdictional grounds:

1. Abandonment of the child;

2. Neglect of the child;

3. Unfitness of the parent;

4. Risk of serious physical, mental or emotional injury to the child if he were returned to, or remains in, the home of his parent or parents;

5. Only token efforts by the parent or parents:

(a) To support or communicate with the child;

(b) To prevent neglect of the child;

(c) To avoid being an unfit parent;

(d) To eliminate the risk of serious physical, mental or emotional injury to the child, or

6. With respect to termination of parental rights of one parent, the abandonment by that parent.

child if visitation were resumed and the child were forced to maintain contact with appellant.[3] NRS 128.105(4).

At trial Dr. Weiheir, respondent's expert witness who examined Mary, testified that there is a serious risk of emotional or mental injury to the child if she were allowed to be in her father's presence. In addition, the doctor testified that Mary would not be injured if she did not see her father again. The doctor also considered alternatives, such as consultation with psychologists and psychiatrists and testified there was no guarantee it would work and that there would be a serious risk of emotional injury.[4] It is precisely this risk that the lower court was asked to eliminate. It must be remembered that in termination proceedings, the

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[3]In addition to the risk to Mary involved in this case, the evidence indicates that appellant left Mary in the care and custody of Nan Daly without privision for the child's support and without communication for more than six months. This constitutes a presumption of abandonment under NRS 128.012(2). Abandonment is also an acceptable jurisdictional ground for termination proceedings. *See* NRS 128.105(1). Moreover, what little communication or attempted communication existed during this period consisted of token efforts; again a recognized jurisdictional ground. *See* NRS 128.105(5)(a). Hence, the court's decision was fully supported on the issue of jurisdiction.

[4]While other court's have imposed certain restrictions upon visitation with the child, such as the length of visitation, the location, or type of permissible activity, in this case such restrictions would accomplish nothing. The court recognized the effect appellant's transsexualism had upon Mary; any modification in visitation would not change that fact. To reiterate, the court did not conclude that appellant was an unfit parent merely because she is a transsexual. Rather, the court recognized the *effect* the situation had upon Mary in this time of her life and the serious risk of emotional or mental injury if visitation were allowed. Mary is very uncomfortable about the possibility of resuming visitation and is presently unprepared to cope with such a prospect.

interests of the child are paramount and a child should not be forced to undergo psychological adjustments, especially in view of the risk involved, solely to avoid termination of a parent's rights. Certainly a parent's rights should be preserved if at all possible, but not at the expense of the child.

Appellant's expert witness also provided support for respondent's position by testifying that there are children who are not able to accept a parent as a transsexual. This witness also stated this was a new area and concluded there is a risk that there would be harm done in either direction. Dr. Weiheir, however, had the opportunity to observe and interview Mary and determined the risk to Mary would exist only if visitation were forced upon Mary.

Notwithstanding the possible harm that would befall Mary if visitation were resumed, NRS 128.107 provides that the child's desires regarding the termination should be a specific consideration, if the child has sufficient capacity to express his or her desires. Considering Mary's age and intelligence, the lower court found her to have the requisite capacity. We agree with the court's finding. In the present case, Mary told Dr. Weiheir and the trial judge that she did not want to see her father. Mary also said it would be disturbing to visit with her father and made it graphically clear that she didn't want to see him again.

The evidence presented in this case decisively establishes the jurisdictional grounds necessary to terminate parental rights. Therefore, our attention will now focus upon the dispositional grounds.

DISPOSITIONAL GROUNDS

Dispositional grounds are satisfied when it is found that the termination is in the child's best interests. At trial, it was undisputed that Mary's mother, Nan, is a very loving and conscientious mother who provides a desirable environment for her daughter. Nan always keeps Mary well fed and clothed and is absolutely dedicated to her child. At the present time, Mary is happy and well adjusted. Nevertheless, if visitation were permitted, there would be a risk of serious maladjustment, mental or emotional injury. Hence, recognizing Mary's present situation, her attitude and feelings, and the substantial risk of emotional or mental injury were she forced to visit with her father, it appears clear that termination of appellant's parental rights is in Mary's best interest.[5]

The trial court was fully aware of the seriousness and finality of a decree terminating parental rights, noting that such a remedy should be applied with caution. The court carefully considered the record and found abandonment and risk of serious mental and emotional harm. The court also found Suzanne to be a selfish person whose own needs,

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[5]It was shown that Mary is at the tender age when she is very much concerned about the impression of her peers and doesn't want to have any sort of uncomfortable fears. Mary would prefer to have her personal life remain a private event. By terminating Suzanne's parental rights, Mary will finally have the assurance and comfort of knowing the visitation matter is settled. Also, Mary's emotional state is preserved, thereby providing her the forum to mature and resolve the situation in her own way. There is nothing to prevent Mary from rekindling the relationship with her father in later years if she so desires, but that choice should be hers, made at a time when the risk of emotional or mental injury is eliminated.

desires and wishes were paramount and were indulged without regard to their impact on the life and psyche of the daughter, Mary.

Our review of the record indicates that the district court's findings are fully supported therein. Suzanne's efforts to regain visitation rights are shown to be a continuing source of apprehension to the child. Suzanne's solution is to subject the child to psychiatric counseling in order to change her mental attitude concerning her father's condition. Inferentially, the child will be more likely to succumb to a process of mental conditioning if she realizes that she will be forced to endure periods of visitation with Suzanne. However, expert testimony at trial reflects substantial doubt as to the success of such counseling at best, and a serious risk of further emotional injury to the child at worst. Such considerations are further complicated by the apparent degree of Mary's revulsion over Suzanne and the irretrievable loss of Suzanne's former relationship with Mary as a parent-father. The future prospects for emotional family stability are also dimmed by Suzanne's indication that Mary should know lesbians, homosexuals and transsexuals and "be a part of their lives" if "they are my [Suzanne's] friends." Suzanne, who admitted that many of her friends are to be found among the aforementioned groups, has thus postured herself in a position of recurring conflicts with the child's mother and the "traditional" upbringing enjoyed by Mary during her formative years. The resulting equation does not bode well for the emotional health and well-being of the child. This Court can perceive no basis for such disruption of Mary's life. Nor do we see the necessity for inflicting a continuing sense of instability and uneasiness on this child. As noted previously, when

Mary reaches the age of majority she can decide whether to reinstate a relationship with Suzanne. In the meantime, given the circumstances concerning Mary's view of Suzanne and the extent of her opposition to further ties with a vestigial parent, it can be said that Suzanne, in a very real sense, has terminated her own parental rights as a father. It was strictly Tim Daly's choice to discard his fatherhood and assume the role of a female who could never be either mother or sister to his daughter.

In sum, the record discloses the fact that appellant has paid no support for over a year, and what little communication there was during this time may be appropriately described as "token." Moreover, the court concluded that termination of appellant's parental rights would be in Mary's best interest. We have determined that the trial court's findings and decision are clearly and convincingly supported by the evidence. Both the jurisdictional and dispositional requisites for the termination of appellant's rights as a parent have been satisfied.

The trial court had all the parties before it, observed their demeanor and weighed their credibility. In this area of such sensitivity, we must accord the lower court due deference. We have considered appellant's remaining contentions and conclude they either lack merit or do not require a reversal. Accordingly, we affirm the lower court's decision.

MOWBRAY, C.J., and YOUNG, J., concur.

GUNDERSON, J., with whom SPRINGER, J., concurs, dissenting:

The natural mother of Mary Toews Daly (Mary), Nan Toews Daly (Nan), filed a petition to terminate the parental rights of the natural father of Mary, who is now legally known as Suzanne Lindley Daly.[1] After a hearing, the district court terminated the father's parental rights over Mary. He then filed the instant appeal. We should reverse, because the district court lacked clear and convincing evidence which demonstrated the need to terminate parental rights over Mary. *At the outset, it should be emphasized that the father does not seek visitation rights at the present time. Hence, with all respect to my brethren in the majority, it seems inappropriate to bottom a ruling against*

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[1]The father's name formerly was Tim Daly. He changed his legal name to Suzanne Lindley Daly in December, 1982. In this opinion, to avoid confusion I shall refer to the parties as the "mother" and the "father."

The father was a transsexual. A transsexual, or a person with sexual dysphoria, is biologically the member of one gender while considering himself as a member of the other gender. Green, *Sexual Identity of 37 Children Raised by Homosexual or Transsexual Parents*, 135 Am.J.Psych. 692, 692 (1978). The medical profession does not know the etiology of transsexuality; however, a person's self-identification as a transsexual appears to occur early in life, probably by the age of four, but might even occur prenatally. *See* Doe v. McConn, 489 F.Supp. 76, 78 (S.D. Tex. 1980); M.T. v. J.T., 355 A.2d 204, 205 (N.J. Super.Ct.App.Div. 1976). Currently, psychotherapy appears to be an ineffective treatment for transsexuality *See* Doe v. Department of Pub. Welfare, 257 N.W.2d 816, 819 (Minn. 1977). According to Ira Pauly, M.D., a psychiatrist and expert in transsexuality, who testified at trial, the medical profession believes that sex reassignment surgery is the best treatment available for a transsexual. For further information on transsexuality, see Comment, M.T. v. J.T.: *An Enlightened Perspective on Transsexualism*, 6 Cap.L. Rev. 403, 403-10 (1976-1977); Comment, *The Law and Transsexualism: A Faltering Response to a Conceptual Dilemma*, 7 Conn.L.Rev. 288, 288-94 (1974-1975); Comment, *Transsexualism, Sex Reassignment Surgery, and the Law*, 56 Cornell L.Rev 963, 965-72 (1970-1971).

him on the supposition that visitation with him could injure Mary.

I

The parties were married in 1969. Their daughter, Mary, was born in August, 1973. By 1979, they had separated. After the separation, the mother worked and resided with Mary in Reno. The father lived in Oakland, California, where he worked at the Lawrence Berkeley Laboratory, a part of the University of California. A final divorce decree was entered on February 17, 1981, in our Second Judicial District Court. Under the decree, the mother received custody of Mary. The father received visitation privileges; he also was required to provide child support and health insurance for Mary.

In 1983, the mother petitioned the court to terminate her former husband's parental rights. The key issue underlying her petition appears to be his transsexuality. Prior to the 1981 medical diagnosis that the father was a transsexual, he had led a seemingly normal life. After high school, he received an appointment to the United States Naval Academy; however, he was unable to attend Annapolis because of poor eyesight. Instead, he enlisted in the United States Army and served honorably. Upon discharge, he attended the University of California at Berkeley. While at Berkeley, he worked at the Lawrence Berkeley Laboratory and double majored in Anthropolgy and in Slavic Language and Literature. After graduation, he continued to work for the Lawrence Berkeley Laboratory. His job, as a scientific research specialist, requires him to design

and build complex research equipment and experimental devices. The parties also started to raise a family.

After their separation, the father had doubts about his gender identity. He consulted with Lynn Frazier, Ph.D., a psychotherapist specializing in the treatment of transsexuals. Dr. Frazier evaluated him for a potential gender identity problem and, using medical guidelines for the diagnosis of transsexuals, Dr. Frazier diagnosed him as a transsexual. Following Dr. Frazier's advice, the father then entered into the preoperative treatment regimen prescribed for transsexuals.

At the termination hearing, Ira Pauly, M.D., a psychiatrist and recognized expert in the field of transsexualism testified about the standards employed to screen candidates for sex reassignment surgery. Those require the candidate to undergo at least six months of psychological evaluation, to undergo a full year of hormonal therapy which allows the candidate to develop the secondary sexual characteristics of the opposite gender, and to undergo the "real life test" which requires the candidate to dress and act as a member of the opposite gender. According to Dr. Pauly, the length and depth of these tests permit the medical professionals evaluating the candidate to determine if he is psychologically prepared to live the remainder of his life as a member of the other gender. The testing also permits the candidate to decide whether he wants to go through the sex reassignment surgery. When the father completed the evaluation phase, Dr. Frazier decided that he was a proper candidate for the surgical phase of the treatment. The surgery was then performed.

In 1981, after having been evaluated as a legitimate candidate[2] for sex reassignment surgery, the father revealed to his daughter that he had been diagnosed as a transsexual, and that his doctors had advised him to undergo sex reassignment therapy. Seeking to prepare her, he discussed with Mary what transsexuality is and what was going to happen to him. Mary, a bright child, apparently developed a reasonable understanding of what he explained to her. Before Mary returned to her mother, the father asked her to keep information secret from her mother; for he believed, correctly as matters turned out, that the mother would seek to use the information against him.

In February of 1982, Mary informed her mother that her father was a transsexual. Upon hearing this disclosure, the mother claimed to be worried about Mary's condition. After Mary had returned from her visit to Tim during the summer of 1981, the mother, in hindsight, thought that Mary had been quieter than normal. However, prior to the disclosure, it appears the mother had no special concerns over Mary's behavior. In addition, a neighbor and school teacher, both of whom knew Mary, did not notice any particular problems with Mary during this period either.

To resolve her concerns, the mother consulted a lawyer and had Mary visit a psychologist. As a result of these

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[2]Dr. Pauly stated, for example, that homosexuals are not appropriate candidates for sex reassignment surgery because, unlike a transsexual who does not accept his biological gender, a homosexual accepts his biological gender and thus does not require this surgery.

discussions, the mother unilaterally decided to deny the father visitation privileges, in violation of the divorce decree. Soon after the mother had made that decision, the father attempted to visit Mary in Reno. However, the mother, using the pretext of a nonexistent court order, had two sheriff's deputies intercept and deter the father before he was able to visit with Mary. Then, in August of 1982, the mother refused to pick up the father's birthday present for Mary at the post office. She also requested him to not telephone their residence.

Once again, in January of 1983, the father was barred from contacting Mary based upon the mother's assertion of another nonexistent court order. Later that day, he attempted to visit Mary at home; however, he was deterred by Mary's gun-wielding grandmother, who would not permit him to enter the premises.

After this incident, the mother sought and received a restraining order prohibiting the father from contacting Mary. She then initiated the instant proceedings to terminate his parental rights. At the termination hearing, both parties testified. Expert testimony was also provided on transsexuality, on the father's medical treatment for transsexuality, and on Mary's psychological condition.

The district court then terminated the father's parental rights. In reaching its decision, the district court basically concluded that Mary would be better off if she did not visit him. The court reached this conclusion based upon its evaluation of the father's emotional stability and upon the potential influence of his friends on Mary. The district court also noted that his "selfishness" did not serve Mary's interests. In addition, the district court found that he had failed to support Mary.

II

Termination of parental rights is governed by NRS 128.005 *et seq.* The grounds for termination of parental rights applicable to the father are listed in NRS 128.105-.107. Beyond the statutes, in reviewing a termination order, we look (1) for the existence of jurisdictional grounds, concerning a parent's conduct or capacity to raise a child, which fall below minimum standards, and (2) for the existence of dispositional grounds, concerning the child's interests, which require that the parental rights be terminated. Champagne v. Welfare Division, 100 Nev. 640, 647, 691 P.2d 849 (1984). To affirm a termination order, both types of grounds must exist. *Id.* at 640, 691 P.2d 849 (1982). I turn, therefore, to consider application of the *Champagne* test to the district court's order.[3]

A

The district court identified several jurisdictional grounds. First, the district court noted that the father had abandoned Mary because of a lack of support and communication over a period of six months or longer. *See* NRS 128.105(1), (5)(a). The mother, however, played an instrumental role in inhibiting contacts with Mary, and manipulated sheriff's deputies and school officials to obstruct attempted visits. Considering these facts and others,

---

[3]In applying *Champagne* to the district court's findings, I characterize the court's pre-*Champagne* decision in terms of *Champagne's* jurisdictional and dispositional categories. *See* e.g., McGuire v. Welfare Division, 101 Nev. 179, 180-81, 697 P.2d 479 (1985).

we cannot properly ignore the obstacles the mother placed in the father's way.[4] *See in re* Adoption of Doe, 677 P.2d 1070, 1074 (N.M.Ct.App.), *cert. denied*, 677 P.2d 624 (N.M. 1984). Despite such barriers, the father continued to maintain medical insurance for Mary. Unlike the case of *Pyborn v. Quathamer*, where no "real attempt" to communicate or to support the child occurred, 96 Nev. 145, 146, 607 P.2d 1141 (1980), he attempted to visit Mary, attempted to communicate with Mary, and did help support Mary. There is thus no clear and convincing showing of a conscious abandonment of Mary. *E.g., In re* Appeal in Maricopa County, Juvenile Action No. JS-3594, 653 P.2d 39, 43-44 (Ariz.Ct.App. 1982); *In re* Appeal in Pima County, Juvenile Action No. S-624, 616 P.2d 948, 950 (Ariz.Ct.App. 1980). Therefore, this jurisdictional ground fails.

The district court also found that Mary faced a risk of serious physical, emotional or mental injury *if the father exercises any parental rights.* However, without the exercise of visitation rights, which he is voluntarily foregoing, such injury admittedly cannot occur. Thus, this jurisdictional ground fails also.

Finally, the district court found that the father's selfishness, his unrealistic thinking about Mary, and his lifestyle adversely affect his ability to be a parent. Because he does not ask to exercise visitation rights, however, these considerations do not currently affect Mary's life.

---

[4]We further note that the father was attempting to regain visitation rights during this same period; he was hindered by counsel who evidently did not expeditiously aid his cause. Where a parent attempts through an attorney to regain his rights, we obviously should not hold that he has abandoned his child merely because of the seemingly ineffective assistance of counsel.

Therefore, the jurisdictional grounds invoked by the district court fail to provide an adequate basis to terminate the father's parental rights.

B

The district court also found several categories of dispositional grounds. The district court noted that Mary should not be around someone with a gender identity problem, should not be in an environment where she might confront sexual minorities, and does not presently wish to be with her father. Again, without visitation, none of these concerns have substance. Therefore, this first category of dispositional grounds fails to justify a termination of the father's parental rights.

The second category of dispositional grounds raised by the district court concerned Mary's anxieties over the dispute between her parents. Yet, no judicial resolution of the instant appeal can stop any hostilities that exist between the parties. With the father foregoing any contact with Mary, little else can be done to resolve Mary's anxieties. Thus, this dispositional ground fails to justify a termination of all parental rights.

Finally, the district court noted that Mary does not now desire to be with appellant and believes he is no longer her father. I recognize the importance of considering a child's views of her parents where the child can sufficiently articulate her desires. NRS 128.107(2). Still, we also should recognize the importance of not severing a parent's rights where a less restrictive alternative exists to permit preservation of a family tie. *E.g., In re* Brooks, 618 P.2d 814, 822 (Kan. 1980). While Mary may no longer have a father figure, she still has a second parent who

desires to contribute to her financial support, and who might someday in the future provide her with needed comfort, affection, and help.

III

In conclusion, I reiterate that Mary and her father currently are totally separated, for he is willing to forego visitation rights at present, in order to maintain his legal status as Mary's parent. This separation protects Mary from all of the concerns, imagined or real, which underlay the district court's termination of parental rights.

A close reading of the majority opinion simply underscores this fundamental point. In attempting to justify the district court's ruling, the majority recite, *inter alia:* "The district court primarily focused upon the risk of serious physical, mental or emotional injury to the child *if visitation were resumed and the child were forced to maintain contact with appellant.*" (Emphasis added.) The majority also state: "At trial Dr. Weiheir, respondent's expert witness who examined Mary, testified that there is a serious risk of emotional or mental injury to the child *if she were allowed to be in her father's presence.*" (Emphasis added.) Again, the majority point out: "Dr. Weiheir, however, had the opportunity to observe and interview Mary and determined the risk to Mary would exist *only if visitation were forced upon Mary.* (Emphasis added.) The majority go on to assert: "Nevertheless, *if visitation were permitted*, there would be a risk of serious maladjustment, mental or emotional injury." (Emphasis added.) Hence, it is to be seen that the majority opinion is premised, not upon fact, but upon suppositions

which are contrary to the facts and which ignore the appellant father's basic legal position.

As previously noted, the appellant father in this matter is a well educated person, long employed by one of this nation's eminent academic institutions. He served this country honorably in its armed forces, and the record indicates, has never been known to violate any of our country's laws. Appellant fathered Mary Daly in wedlock, and, since divorce, has maintained an interest in her and has continued attempts to provide for her, even though the respondent has improperly impeded those legitimate efforts.

In psychological distress, the father has consulted legitimate and respected medical authorities. The advice given by those medical authorities may offend the religious precepts of many. In the ultimate judgment of history, such advice may well yet be condemned as quackery. Still, I respectfully submit that a court of law should not stigmatize an emotionally distressed person for following the advice of highly trained and licensed physicians, who are practicing medicine under government authority, and who possess the most exalted credentials their profession can bestow. Nor should any parent be stigmatized for attempting to forewarn a child concerning medical procedures the parent is about to undergo pursuant to such advice.

Recognizing that the medical procedures he has undergone currently occasion distress to her child, the father does not contend he should now be allowed visitation rights. Rather, he contends merely that he has done nothing to warrant severing his formal legal parental tie to Mary Daly, apparently hoping that the passage of time will re-

store in Mary a desire to know him. In the meantime, the father recognizes, he would have to accept the duty of contributing to Mary's support, while foregoing visitation with the child.

As I assess the record, the fact that the appellant father has suffered emotional problems which are foreign to the experience of this court's members, and has followed the possibly poor advice of eminent medical authorities in his attempt to relieve them, does not justify a total and irrevocable severance of appellant's formal legal tie to a child he obviously cares about and desires to help nurture. By holding that such a severance is justified in these facts, it seems to me, we are being unnecessarily and impermissibly punitive to the exercise of a medical option we personally find offensive, thereby depriving a child of a legal relationship which might well be to the child's advantage in the future.

Case No. 82-3979

Dept. No. 3

IN THE SECOND JUDICIAL DISTRICT COURT
OF THE STATE OF NEVADA IN AND FOR
THE COUNTY OF WASHOE

IN THE MATTER OF THE PARENTAL RIGHTS
AS TO MARY TOEWS DALY, a minor child.

DECISION

(Filed April 11, 1983)

The verified Petition of Nan Toews Daly for Termination of Parental Rights as to Mary Toews Daly, a 9 year old child, came on regularly for hearing on February 24, 1983. The Petitioner was personally present with her attorney, Nada Novakovich. Respondent, natural father, Timothy Mark Daly, also known as Suzanne Lindley Daly, was present together with her attorneys, Susan J. Haveson, Ellen LaCroix and Ann Casamajor. Oral and documentary evidence was adduced. The matter was argued and submitted subject to any further briefs which the parties were to file and a Transcript of Oral Arguments being received by the Court.

The Court deeming itself fully advised in the premises finds and concludes as follows:

Petitioner is the natural mother of the minor child, Mary Toews Daly, born on August 21, 1983, and Respondent is the natural father of the child. The Respondent is a preoperative male-to-female transsexual, presently living full time as a woman. On December 9, 1982, Respondent changed, by Court Order, from Tim Daly to Suzanne Lindley Daly.

A Decree of Divorce was entered in this Court on October 2, 1980, wherein physical custody of the child was awarded to the Petitioner with the Respondent retaining reasonable visitation rights as specified in the decree.

Respondent regularly exercised visitation rights as specified in the decree, seeing the child approximately one weekend per month, on alternate holidays and for one month in the summer.

While the child was with the Respondent in August of 1981, Respondent discussed her personal situation with the 8 year old child, explaining her feelings and intentions to be hormonally and surgically reassigned as a female.

Although Respondent and Mary agreed that the matter would be best concealed from the Petitioner, Mary was apparently induced to reveal her knowledge. From that point onward, Respondent has been denied any contact with Mary. Efforts to exercise visitation rights were frustrated. Respondent has not seen or heard from her child for over a year.

The Petitioner has filed this petition to permanently terminate Respondent's parental rights alleging unfitness under provisions of NRS 128.. et. seq.

This Court is fully aware of the seriousness and terrible finality of a decree terminating parental rights, and that such a remedy should be applied with caution. This Court having in mind at all times the polar start of termination proceedings is the best interests of this child only.

The issue presented is to determine whether Suzanne Lindley Daly's parental rights to Mary should be termi-

nated, giving due consideration to her rights as a natural parent, but with the dominant purpose of serving the best interests of the minor child. The overriding principle for the court to follow in evaluating the evidence is set forth in NRS 128.090:

> "... The court ..... shall in all cases require the petitioner to establish the facts and shall give full and careful consideration of all the evidence presented with due regard to rights and claims of the parent or parents of such person, and to any and all ties of blood or affection, but *with the dominant purpose of serving the best interests of such minor person.*" [emphasis added]

Chapter 128. NRS pertaining to termination of parental rights, Section 128.005 provides: "The legislature declares that the preservation and strengthening of family life is part of the public policy of this state." The legislature finds, in Section C that: "The continuing need of a child for proper physical, mental and emotional growth and development are the decisive considerations in proceedings for termination of parental rights."

One of the important single factors to be considered is the moral character and emotional stability of the Respondent, Suzanne Lindley Daly, since she would create the moral environment the child would be in if Mary were in her physical custody during any exercise of visitation rights.

Due to circumstances brought about by her own actions and conduct, Respondent Suzanne, to date of the hearing, had been unable for whatever reason to put her life in a condition where it would be in the "best interests" of Mary to have parental rights as to her.

The decisive considerations are the continuing needs of the child for the proper physical, mental, and emotional growth and development.

Dr. Ira Pauly testified on behalf of the Respondent and summarized this case when he said, "we are treading on thin ice."

We are dealing with the life and mind of a 9 year old girl. And the Court must determine what is in her best interests. She is a healthy happy little girl living with her mother and grandmother, and is gifted with a brilliant future ahead of her. She is well adjusted and relates well to people, to her teacher, to her peers and to her friends.

Nevada Revised Statutes provide for termination of parental rights in any one of three instances, i.e., abondonment, neglect, and unfitness. The element of nonsupport is present and can be one of the elements.

NRS 128.105 generally provides that there can be termination to eliminate the risk of serious physical, mental or emotional injury to the child. If the natural father is not capable for whatever reason to be a father for the child within the minimal acceptable standards, he is to be deemed unfit, unstable, or unqualified to have reasonable visitation rights as deemed not the best interests of the child or for the child's welfare.

The record and testimony fairly reflects that there is a risk if the child were accorded parental rights, visitation, etc. She has a risk to be put in an environment of persons who prefer sexual minorities which are not normal or typical or are irregular and not generally accepted by

society. The Court finds that Mary is under emotional distress over this situation at this time.

The Court is of the opinion that Respondent is a selfish person to his own needs, his own desires, his own wishes, and is not thinking in a realistic way about Mary.

Respondent Suzanne wants this 9 year old daughter to accept her life style in her life, regardless of what could be a very serious thing to a little girl. Suzanne made her choice. It does show disregard for this child's well being and this child's welfare. The indications are that Respondent Suzanne has some very serious emotional problems. Mary doesn't need exposure to a person who has what Dr. Pauly calls a "gender identity" problem or who is undergoing psychotherapy treatment for the same, which is dramatic and emotional.

Also, the Court is mindful of the distressing situation which exists between Respondent and his former wife, the Petitioner, which permeated the entire proceedings. The Court is also mindful that hostility and alienation, originating with the custodial, nontranssexual parent, are common and frequently result in a poisoning of the relationship between the transsexual parent and the child. It appears to this Court that the situation here is *not resolvable* without hurting Mary deeply.

If the Court does not terminate the parental rights of Respondent, the Daly's are going to be faced with multiple problems. There is a serious risk of physical, mental and emotional harm to this child should we take a chance. The Court must face reality in this situation.

In chambers with the Court and attorneys, the child generally stated that she did not want to be with her father and that he does not exist anymore.

The Court is abundantly aware that we have to be careful when we tamper with fundamental rights, constitutional rights, and here, by natural rights, i.e., mother and father.

There is a suggestion in counsel's argument that Respondent is being discriminated against because she is a transsexual. This Court is keenly aware of this situation and endeavors to avoid it in rendering a decision on the facts.

The record fairly discloses that the surrounding circumstances in the situation here involved is now adversely affecting Respondent's relationship with the child and impairs the child's emotional development and the child is not prepared to cope with it. The evidence shows that the anxiety and confusion created over this termination proceeding, is not to the advantage of this child.

LET JUDGMENT BE ENTERED TERMINATING Respondent's Parental rights as to Mary Toews Daly in accordance with the foregoing and Chapter 128 of Nevada Revised Statutes.

Each party should bear their own court costs and attorney's fees.

Counsel for the Petitioner is requested to prepare formal Findings of Fact, Conclusions of Law and Judgment accordingly and present same to the Court for signature and filing at her earliest convenience.

DATED: This 11th day of April, 1983.

/s/ John E. Gabrielli
District Judge

CERTIFICATION OF DELIVERY OF A COPY

The undersigned hereby certifies that on the 12th day of April, 1983, she mailed a copy of the attached Decision to the following:

Nada Novakovich
Attorney at Law
50 West Liberty St.
Suite 650
Reno, NV 89501

Susan J. Haveson
Attorney at Law
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Ellen LaCroix
Attorney at Law
P.O. Box 3286
Berkeley, CA 94703

Ann Casamajor
Attorney at Law
% Ellen LaCroix
P.O. Box 3286
Berkeley, CA 94703

/s/ J. Spencer

CERTIFIED COPY

The document to which this certificate is attached is a full, true and correct copy of the original on file, and of record in my office.

DATE: June 25, 1986

JUDI BAILEY, Clerk of the Second Judicial District Court, in and for the County of Washoe, State of Nevada.

By /s/ Rocasee, Deputy

No. 82-3979

Dept. No. 3

IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF WASHOE

IN THE MATTER OF THE PARENTAL RIGHTS AS TO MARY TOEWS DALY, a minor child,

FINDINGS OF FACT AND CONCLUSIONS OF LAW

(Filed May 2, 1983)

The verified Petition of Nan Toews Daly for Termination of Parental Rights as to Mary Toews Daly, a 9 year old child, came on regularly for hearing on February 24, 1983. The Petitioner was personally present with her attorney, NADA NOVAKOVICH. Respondent, Timothy Mark Daly, also known as Suzanne Lindley Daly, was present together with her attorneys, SUSAN J. HAVESON, ELLEN LaCROIX and ANN CASAMAJOR. Oral and documentary evidence was adduced. The matter was argued and submitted subject to any further briefs which the parties were to file and a Transcript of Oral Arguments being received by the Court.

The Court deeming itself fully advised in the premises finds and concludes as follows:

FINDINGS OF FACT

I.

Petitioner is the natural mother of the minor child, Mary Toews Daly, born on August 21, 1973, and Respon-

dent is the natural father of the child. The Respondent is a preoperative male-to-female transsexual, presently living full time as a woman. On December 9, 1982, Respondent changed, by Court Order, from Tim Daly to Suzanne Lindley Daly.

II.

A Decree of Divorce was entered in this Court on October 2, 1980, wherein physical custody of the child was awarded to the Petitioner with the Respondent retaining reasonable visitation rights as specified in the decree.

III.

Respondent regularly exercised visitation rights as specified in the decree, seeing the child approximately one weekend per month, on alternate holidays and for one month in the summer.

IV.

While the child was with the Respondent in August of 1981, Respondent discussed her personal situation with the 8 year old child, explaining her feelings and intentions to be hormonally and surgically reassigned as a female.

V.

Although Respondent and Mary agreed that the matter would be best concealed from the Petitioner, Mary was apparently induced to reveal her knowledge. From that point onward, Respondent has been denied any contact with Mary. Efforts to exercise visitation rights were

frustrated. Respondent has not seen or heard from her child for over a year.

VI.

The Petitioner has filed this Petition to permanently terminate Respondent's parental rights alleging unfitness under provisions of NRS 128, et. seq.

VII.

This Court is fully aware of the seriousness and terrible finality of a decree terminating parental rights, and that such a remedy should be applied with caution. This Court having in mind at all times the polar star of termination proceedings is in the best interests of this child only.

VIII.

The issue presented is to determine whether Suzanne Lindley Daly's parental rights to Mary should be terminated, giving due consideration to her rights as a natural parent, but with the dominant purpose of serving the best interests of the minor child. The overriding principle for the Court to follow in evaluating the evidence is set forth in NRS 128.090:

> "... The court ..... shall in all cases require the petitioner to establish the facts and shall give full and careful consideration of all the evidence presented with due regard to rights and claims of the parent or parents of such person, and to any and all ties of blood or affection, but *with the dominant purpose of serving the best interests of such minor person.*" [emphasis added]

Chapter 128. NRS pertaining to termination of parental rights, Section 128.005 provides: "The legislature declares that the preservation and strengthening of family life is part of the public policy of this state." The legislature finds, in Section C, that: "The continuing need of a child for proper physical, mental and emotional growth and development are the decisive considerations in proceedings for termination of parental rights."

IX.

One of the important single factors to be considered is the moral character and emotional stability of the Respondent, Suzanne Lindley Daly, since she would create the moral environment the child would be in if Mary were in her physical custody during any exercise of visitation rights.

X.

Due to circumstances brought about by her own actions and conduct, Respondent Suzanne, to date of the hearing, had been unable for whatever reason to put her life in a condition where it would be in the "best interests" of Mary to have parental rights as to her.

XI.

The decisive considerations are the continuing needs of the child for the proper physical, mental and emotional growth and development.

XII.

Dr. Ira Pauly testified on behalf of the Respondent and summarized this case when he said, "we are treading on thin ice."

XIII.

We are dealing with the life and mind of a 9 year old girl. And the Court must determine what is in her best interests. She is a healthy, happy little girl living with her mother and grandmother, and is gifted with a brilliant future ahead of her. She is well-adjusted and relates well to people, to her teacher, to her peers and to her friends.

XIV.

Nevada Revised Statutes provide for termination of parental rights in any one of three instances, i.e., abandonment, neglect, and unfitness. The element of non-support is present and can be one of the elements.

XV.

NRS 128.105 generally provides that there can be termination to eliminate the risk of serious physical, mental or emotional injury to the child. If the natural father is not capable for whatever reason to be a father for the child within the minimal acceptable standards, he is to be deemed unfit, unstable or unqualified to have reasonable visitation rights as deemed not in the best interests of the child or for the child's welfare.

XVI.

The record and testimony fairly reflects that there is a risk if the child were accorded parental rights, visita-

tion, etc. She has a risk to be put in an environment of persons who prefer sexual minorities which are not normal or typical or are irregular and not generally accepted by society. The Court finds that Mary is under emotional distress over this situation at this time.

XVII.

The Court is of the opinion that Respondent is a selfish person to his own needs, his own desires, his own wishes, and is not thinking in a realistic way about Mary.

XVIII.

Respondent Suzanne wants this 9 year old daughter to accept her life style in her life, regardless of what could be a very serious thing to a little girl. Suzanne made her choice. It does show disregard for this child's well being and this child's welfare. The indications are that Respondent Suzanne has some very serious emotional problems. Mary doesn't need exposure to a person who has what Dr. Pauly calls a "gender identity" problem or who is undergoing psychotherapy treatment for the same, which is dramatic and emotional.

XIX.

Also, the Court is mindful of the distressing situation which exists between Respondent and his former wife, the Petitioner, which permeated the entire proceedings. The Court is also mindful that hostility and alienation, originating with the custodial, non-transsexual parent, are common and frequently result in a poisoning of the relationship between the transsexual parent and the child.

It appears to this Court that the situation here is *not resolvable* without hurting Mary deeply.

XX.

If the Court does not terminate the parental rights of Respondent, the Dalys are going to be faced with multiple problems. There is a serious risk of physical, mental and emotional harm to this child should we take a chance. The Court must face reality in this situation.

XXI.

In chambers with the Court and attorneys, the child generally stated that she did not want to be with her father and that he does not exist anymore.

XXII.

The Court is abundantly aware that we have to be careful when we tamper with fundamental rights, constitutional rights, and here, by natural rights, i.e., mother and father.

XXIII.

There is a suggestion in counsel's argument that Respondent is being discriminated against because she is a transsexual. This Court is keenly aware of this situation and endeavors to avoid it in rendering a decision on the facts.

XXIV.

The record fairly discloses that the surrounding circumstances in the situation here involved is now adversely affecting Respondent's relationship with the child and

impairs the child's emotional development and the child is not prepared to cope with it. The evidence shows that the anxiety and confusion created over this termination proceeding is not to the advantage of this child.

CONCLUSIONS OF LAW

From the foregoing facts, Court concludes that a judgment be entered terminating the parental rights of TIMOTHY MARK DALY, a/k/a/ SUZANNE LINDLEY DALY, as to MARY TOEWS DALY in accordance with the foregoing and Chapter 128 of Nevada Revised Statutes.

Each party should bear their own court costs and attorney's fees.

Let judgment be entered accordingly.

DATED: This 2nd day of May, 1983.

/s/ John E. Gabrielli
District Judge

CERTIFIED COPY

The document to which this certificate is attached is a full true and correct copy of the original on file, and of record in my office.

DATED: June 25, 1986.

JUDI BAILEY, Clerk of the Second Judicial District Court, in and for the County of Washoe. State of Nevada.

/s/ J. Rocasee, Deputy

No. 82-3979

Dept. No. 3

IN THE SECOND JUDICIAL DISTRICT COURT
OF THE STATE OF NEVADA IN AND FOR
THE COUNTY OF WASHOE

IN THE MATTER OF THE PARENTAL RIGHTS
AS TO MARY TOEWS DALY, a minor child.

JUDGMENT AND DECREE

(Filed May 2, 1983)

The verified Petition of Nan Toews Daly for Termination of Parental Rights as to Mary Toews Daly, a 9 year old child, came on regularly for hearing on February 24, 1983. The Petitioner was personally present with her attorney, NADA NOVAKOVICH. Respondent, natural father, Timothy Mark Daly, also known as Suzanne Lindley Daly, was present together with her attorneys, SUSAN J. HAVESON, ELLEN LaCROIX and ANN CASAMAJOR. Oral and documentary evidence was adduced. The matter was argued and submitted subject to any further briefs which the parties were to file and a Transcript of Oral Arguments being received by the Court.

NOW, THEREFORE, IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the parental rights of Timothy Mark Daly, also known as Suzanne Lindley Daly, as to Mary Toews Daly are terminated in accordance with the decision of the Court and Findings of Fact and Conclusions of Law filed herein and Chapter 128 of Nevada Revised Statutes.

Each party should bear their own court costs and attorney's fees.

DATED this 2nd day of May, 1983.

/s/ John E. Gabrielli
District Judge
Recorded Judgment Docket
Book A-46 Page D-9
Judi Bailey, Clerk
By L. Snow, Deputy

CERTIFIED COPY

The document to which this certificate is attached is a full, true and correct copy of the original on file, and of record in my office.

DATE: June 25, 1986.

JUDI BAILEY, Clerk of the Second Judicial District Court, in and for the County of Washoe, State of Nevada.

By /s/ Rocasee, Deputy

128.012 "Abandonment of a child" defined.

1. "Abandonment of a child" means any conduct of one or both parents of a child which evinces a settled purpose on the part of one or both parents to forego all parental custody and relinquish all claims to the child.

2. If a parent or parents of a child leave the child in the care and custody of another without provision for his support and without communication for a period of 6 months, or if the child is left under such circumstances that the identity of the parents is unknown and cannot be ascertained despite diligent searching, and the parents do not come forward to claim the child within 3 months after he is found, the parent or parents are presumed to have intended to abandon the child.

(Added to NRS by 1975, 963; A 1981, 1753)

128.015 "Parent and child relationship," "parent" defined.

1. "Parent and child relationship" includes all rights, privileges and obligations existing between parent and child, including rights of inheritance.

2. As used in this section, "parent" includes an adoptive parent.

(Added to NRS by 1975, 964)

128.018 "Unfit parent" defined. "Unfit parent" is any parent of a child who, by reason of his fault or habit

or conduct toward the child or other persons, fails to provide such child with proper care, guidance and support.

(Added to NRS by 1975, 964; A 1981, 1753)

128.090 Hearing; evidence and postponement.

1. At the time stated in the notice, or at the earliest time thereafter to which the hearing may be postponed, the court shall proceed to hear the petition.

2. The proceedings are civil in nature and are governed by the Nevada Rules of Civil Procedure. The court shall in all cases require the petitioner to establish the facts and shall give full and careful consideration to all of the evidence presented, with due regard to the rights and claims of the parent or parents of the child and to any and all ties of blood or affection, but with a dominant purpose of serving the best interests of the child.

3. The standard of proof to be adduced in the proceedings is a preponderance of the evidence.

4. Information contained in a report filed pursuant to NRS 200.501 to 200.509, inclusive, may not be excluded from the proceeding by the invoking of any privilege.

5. In the event of postponement, all persons served, who are not present or represented in court at the time of the postponement, must be notified thereof in the manner provided by the Nevada Rules of Civil Procedure.

[9:161:1953]—(NRS A 1969, 95; 1981, 1754)

128.105 Grounds for terminating parental rights: Basic considerations. An order of the court for termination of parental rights may be made on the grounds that the termination is in the child's best interest in light of the considerations set forth in this section and NRS 128.106 to 128.108, inclusive:

1. Abandonment of the child;

2. Neglect of the child;

3. Unfitness of the parent;

4. Risk of serious physical, mental or emotional injury to the child if he were returned to, or remains in, the home of his parent or parents;

5. Only token efforts by the parent or parents:

(a) To support or communicate with the child;

(b) To prevent neglect of the child;

(c) To avoid being an unfit parent;

(d) To eliminate the risk of serious physical, mental or emotional injury to the child; or

6. With respect to termination of the parental rights of one parent, the abandonment by that parent.

(Added to NRS by 1975, 964; A 1981, 1755)

128.106 Specific considerations in determining neglect by or unfitness of parent. In determining neglect by or unfitness of a parent, the court shall consider, without limitation, the following conditions which may diminish suitability as a parent:

1. Emotional illness, mental illness or mental deficiency of the parent which renders the parent consistently unable to care for the immediate and continuing physical or psychological needs of the child for extended periods of time.

2. Conduct toward a child of a physically, emotionally or sexually cruel or abusive nature.

3. Excessive use of intoxicating liquors, controlled substances or dangerous drugs which renders the parent consistently unable to care for the child.

4. Repeated or continuous failure by the parent or parents, although physically and financially able, to provide the child with adequate food, clothing, shelter, education or other care and control necessary for his physical, mental and emotional health and development, but a person who, legitimately practicing his religious beliefs, does not provide specified medical treatment for a child is not for that reason alone a negligent parent.

5. Conviction of the parent or parents for commission of a felony, if the facts of the crime are of such a nature as to indicate the unfitness of the parent or parents to provide adequate care and control to the extent necessary for the child's physical, mental or emotional health and development.

6. Unexplained injury or death of a sibling of the child.

7. Inability of appropriate public or private agencies to reunite the family despite reasonable efforts on the part of the agencies.

(Added to NRS by 1981, 1751)

128.108 Specific considerations where child has been placed in foster home. If a child is in the custody of a public or private agency and has been placed and resides in a foster home and the custodial agency institutes proceedings pursuant to this chapter regarding the child, with an ultimate goal of having the child's foster parent or parents adopt him, the court shall consider whether the child has become integrated into the foster family to the extent that his familial identity is with that family, and whether the foster family is able and willing permanently to treat the child as a member of the family. The court shall consider, without limitation:

1. The love, affection and other emotional ties existing between the child and the parents, and the child's ties with the foster family.

2. The capacity and disposition of the child's parents from whom the child was removed as compared with that of the foster family to give the child love, affection and guidance and to continue the education of the child.

3. The capacity and disposition of the parents from whom the child was removed as compared with that of the foster family to provide the child with food, clothing and medical care and to meet other physical, mental and emotional needs of the child.

4. The length of time the child has lived in a stable, satisfactory foster home and the desirability of his continuing to live in that environment.

5. The permanence as a family unit of the foster family.

6. The moral fitness, physical and mental health of the parents from whom the child was removed as compared with that of the foster family.

7. The experiences of the child in the home, school and community, both when with the parents from whom he was removed and when with the foster family.

8. Any other factor considered by the court to be relevant to a particular placement of the child.

(Added to NRS by 1981, 1752)

128.120 Effect of order. Any order made and entered by the court under the provisions of NRS 128.110 is conclusive and binding upon the person declared to be free from the custody and control of his parent or parents, and upon all other persons who have been served with notice by publication or otherwise, as provided by this chapter. After the making of the order, the court has no power to set aside, change or modify it, but nothing in this chapter impairs the right of appeal.

[12:161:1953]—(NRS A 1981, 1756)

No. 82-3979

Dept. No. 3

IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA,

IN AND FOR THE COUNTY OF WASHOE

IN THE MATTER OF THE PARENTAL RIGHTS AS TO MARY TOEWS DALY, A minor child.

AFFIDAVIT

(Filed February 10, 1983)

NAN TOEWS DALY, being first duly sworn, deposes and says:

That she is the Petitioner in the above referenced matter and the natural mother of the minor child, namely, MARY TOEWS DALY.

That on the 31st day of January, 1983 TIM DALY, also known as TIMOTHY MARK DALY, along with his attorney, went to the grammar school where the said child is attending school to attempt to make contact with the child, and again to make contact with the child at the school bus depot.

Petitioner believes that TIM DALY, also known as TIMOTHY MARK DALY, is attempting to take the child from the jurisdiction of this Court which will jeopardize the child's welfare; that the said TIM DALY, also known as TIMOTHY MARK DALY, is a transsexual by his own admission and that there is a risk of serious physical, mental or emotional injury to the child if the said TIM DALY, also known as TIMOTHY MARK DALY, obtains custody of the child in any manner.

WHEREFORE, the Petitioner prays that this Court issue a Restraining Order restraining TIM DALY, also known as TIMOTHY MARK DALY, from contacting, communicating with, or removing the child from the jurisdiction of this Court during the pendency of this action.

DATED this 3rd day of February, 1983.

/s/ Nan Toews Daly

SUBSCRIBED and SWORN to before me
this 3rd day of February, 1983.

/s/ Ruth L. Brockway
Notary Public

SEAL

RUTH L. BROCKWAY
Notary Public—State of Nevada
Washoe County
My Appointment Expires Aug. 24, 1984.

No. 82-3979

Dept. No. 3

IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA,

IN AND FOR THE COUNTY OF WASHOE

IN THE MATTER OF THE PARENTAL RIGHTS AS TO MARY TOEWS DALY
A minor child.

RESTRAINING ORDER

Upon reading the verified affidavit of NAN TOEWS DALY, Petitioner in the above entitled matter and good cause appearing therefor,

IT IS HEREBY ORDERED that TIM DALY, also known as TIMOTHY MARK DALY, is restrained from contacting, communicating with, or removing the minor child, MARY TOEWS DALY, from the jurisdiction of this Court during the pendency of this action.

DATED this 9th day of February, 1983.

/s/ John E. Gabrielli
District Judge

CERTIFICATE OF MAILING

Pursuant to NRCP 5 (b), I certify that I am an employee of NADA NOVAKOVICH, Attorney at Law, and that this day I deposited for mailing at Reno, Nevada, a true copy of the foregoing Restraining Order addressed to:

Susan J. Haveson
320 East Liberty Street
Suite 200
Reno, Nevada 89501

DATED this 11th day of February, 1983.

/s/ Ruth L. Brockway

Case No. 82-3979

Dept. No. 3

IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF WASHOE

IN THE MATTER OF THE PARENTAL RIGHTS AS TO MARY TOEWS DALY, a minor child.

ORDER

(Filed December 7, 1983)

Petitioner Nan Toews Daly's Motion to Dismiss Appeal, filed October 11, 1983, was submitted to the Court for decision on November 22, 1983, pursuant to WDCR 11, upon the motion, legal points and authorities in support thereof, and upon Respondent/Appellant's filing of Notice of Filing of Cash Deposit in Lieu of Bond for Costs on Appeal, filed November 21, 1983, Designation of Record on Appeal, filed November 21, 1983, and attached letter to the Court from Ann Casamajor, former attorney for Respondent/Appellant, Suzanne Lindley Daly, who is assisting Respondent/Appellant in the matter of filing these papers in Propria Persona, all the pleadings and proceedings heretofore had in this case, and the entire file.

The Court deeming itself fully advised in the premises finds and concludes that the Petitioner's Motion to Dismiss Appeal should be denied because it is this Court's considered opinion and general practice not to dismiss any party's appeal to the Supreme Court for technical procedural grounds and this Court is of the opinion that the Supreme Court should make this decision in this instance

for the best interests of the administration of justice in this State.

IT IS SO ORDERED.

DATED: This 7th day of December, 1983.

/s/ John E. Gabrielli
District Judge

CERTIFICATION OF DELIVERY OF A COPY

The undersigned hereby certifies that on the 8th day of December, 1983, she mailed a copy of the attached Order and Letter to the following:

Nada Novakovich
Attorney at Law
P.O. Box 2473
Reno, NV 89505

Suzanne Lindley Daly
2545 Wallace Street
Oakland, CA 94606

Ann Casamajor
Attorney at Law
P.O. Box 6246
Albany, CA 94706

/s/ J. Spencer

IN THE SUPREME COURT
OF THE STATE OF NEVADA

CASE NUMBER 15423

SUZANNE LINDLEY DALY,
formerly known as
TIM DALY,

Appellant,

vs.

NAN TOEWS DALY,

Respondent.

APPELLANT'S OPENING BRIEF

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Attorney for Respondent

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ISSUES ON APPEAL

I. DID THE TRIAL COURT HAVE JURISDICTION TO SUPERSEDE A FINAL DECREE OF DISSOLUTION SETTLING PARENTAL RIGHTS?

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III. WAS THE STANDARD OF PROOF CONSTITUTIONALLY ADEQUATE?

IV. IS THE DECREE TERMINATING PARENTAL RIGHTS SUPPORTED BY SUBSTANTIAL EVIDENCE?

* * *

II. THE TRIAL COURT DENIED APPELLANT DUE PROCESS OF LAW IN TERMINATING HER PARENTAL RIGHTS.

A. Procedural Due Process.

1. *An action for termination of parental rights is quasi-criminal.*

Santosky v. Kramer (1982) 455 US 745:

> " . . . the factfinding stage of a . . . permanent neglect proceeding bears many of the indicia of a criminal trial" 455 US at 762

The instant action was in effect a criminal action brought by a private party, the absurdity of which is plain. The pleading was accusatory, not compensatory in the civil sense or declaratory in the domestic sense; it sought solely to establish that Appellant had done some act or acts which entitled the state to restrain her fundamental rights. It sought as relief not the compensation of a plaintiff or the dissolution of previously shared rights and obligations, but punishment for wrongdoing, a punishment the United States Supreme Court has recently judged " 'as great [as],

if not greater, than a criminal penalty . . .' ". *Santosky v. Kramer, supra* at 455 US 769. This is capital punishment of a parent's soul for the crime of being different.

2. *Appellant was denied effective counsel at critical stages of the termination proceedings.*

A very recent United States Supreme Court decision has established standards for effectiveness of counsel which are applicable herein. *Strickland v. Washington* (May 14, 1984) 44 CCH SCT Bull B 2512, 52 USLW 4565 set forth the following criterion:

> "The defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." 44 CCH SCT Bull B 2538

The application is simple: had attorney Haveson not submitted Appellant to the jurisdiction of the termination court, it could not have proceeded. Not only was there a reasonable probability that the result would have been different, there would have been no action in which to terminate Appellant's parental rights, but for the betrayal of counsel at the threshold of amenability to Nevada adjudication.

Further evidence of attorney Haveson's neglect lies in the belated motion for a mental examination (CI 16-17). What was the point of an examination on the eve of trial? It would be difficult at best to allow time for a decision on the motion, let alone meaningful examination and report before the hearing; the horse had long since departed and there was no point in closing the barn door.

Appellant and her California attorneys, then, went to trial with jurisdictional defects waived, no discovery, and

a mandatory local counsel whose ineffectiveness not only prejudiced Appellant's case, but required that a case be presented at all.

The trial court noted attorney Lacroix' inexperience (RT 3:8-29) and specifically requested that attorney Haveson remain at the hearing. The failure of either the inexperienced Lacroix or the indifferent Haveson to object to Respondent's sweeping statement that she had "hit all the grounds in the statute" (RT 2:14-28) opened the proceeding to unpleaded grounds. (CI 1-4). Respondent pleaded only unfitness and risk of harm, yet repeatedly invoked the grounds of neglect and abandonment (RT 2:14-17; 17:17-24; 26:28-28:4; 308:29-313:15; 327:12-333:25; 357:8-359:10). The court's vague reference to non-support (CI 51:15-16) shows the confusion caused by inattention to the scope of the pleadings.

3. *The restraining order signed by the trial court violated Appellant's rights to notice and opportunity to be heard.*

In response to Appellant's effort to contact her child at school, (RT 140:22-141:16), the trial court granted unnoticed *ex parte restraint* to Respondent (CI 1-12) upon a ludicrous "affidavit" (CI 13-14) which was unserved and unfiled. *Rule 65, Nevada Rules of Civil Procedure*, sets forth stringent notice, scope, and duration requirements for restraining orders:

> a. NRCP 65(b) requires that: (1) irreparable harm will clearly occur unless immediate action is taken; (2) applicant's attorney must certify in writing the efforts made to provide notice; the order note the hour and date of rendition, be filed with the clerk, and expire in 15 days; hearing on preliminary injunction

be held as soon as possible or the restraining order be dissolved;

b. NRCP 65(c) requires security for costs to a to a party wrongfully restrained;

c. NRCP 65(d) requires specificity in the restraining order as to reasons for issuance other than by reference to pleadings or other documents;

d. NRCP 65(f) exempts "suits for divorce . . . or custody of children"; orders in such cases need only be "just".

If the termination action was a "suit . . . for . . . custody of children", the UCCJA applied. NRS 125A.040; the UCCJA was ignored here.

This court, in *Turner v. Saka* (1974) 90 Nev. 54, 518 P2d 608, found unnoticed restraint unreasonable and unjust:

"'. . . any . . . motion involving judicial discretion that affects the rights of another . . . must be made on notice even where no rule expressly requires notice to obtain the particular order sought, except only when this requirement is altered to meet extraordinary situations such as those concerned in NRCP 65(b) . . . although an order's subject matter would lie within the court's jurisdiction if properly applied for, it is void if entered without the required notice . . . it makes no difference that a void order may concern a matter committed to the court's discretion . . . regarding which the court might have granted protective orders had a proper application been made."

518 P2d at 613

"Although NRCP 65(f) may be read to envision somewhat greater flexibility and less formality in domestic matters than in other litigation, still we do not read it as dispensing with the requirement that there be either notice or a showing of necessity befor [sic] existing

custody rights are disturbed. An order entered without one or the other simply is not "just".

id. at 614

The *Turner* court then considered the contents of the "Verified Complaint" and affidavits by which Saka obtained the order, concluding they were devoid of specific facts establishing a need for immediate relief. Although the documents "attempted to show Mrs. Turner was of poor character", this court was not persuaded:

". . . the creative prose of counsel fell short of establishing such an emergency . . ."

id. at 614

Respondent's supporting papers were even worse. (CI 1-2; 13-14). The vague allegations of the "affidavit" (CI 13-14) are post-decree boilerplate. In *Matter of Lemond* (Ind 1980) 413 NE2d 228, 239, a noncustodial father, after years of hearings and appeals, sought temporary restraint under child protection statutes upon allegations of: (1) child hated and feared other parent, would not return to her; (2) other parent caused severe emotional distress; (3) other parent did not provide a fit environment; (4) child would be taken from the jurisdiction. 413 NE 2d at 239, fn 12. As a study in parental mendacity alone, *Lemond* bears reading.

Here, the restraining order was never regularly filed (see face of CI 11 and notiation at Page 3, Line 21 of CI), nor was it served other than by mailing it across town to attorney Haveson, who received it February 14, 1983, two weeks after the incident which provoked it. *District Court Rule 24* requires prompt filing of orders.

A temporary restraint of Appellant's fundamental parental rights is nevertheless a violation of due process:

> " '[I]t is now well settled that a temporary, nonfinal deprivation . . . is nonetheless 'deprivation' in the terms of the Fourteenth Amendment' "
>
> *Turner v. Saka, supra,* 518 P2d at 613 (quoting *Fuentes v. Shevin* (1972) 407 US 67)

At the time the trial court restrained Appellant, the unmodified decree still provided for visitation (RT 289:10-294:23); which proceeding is to control such a situation?

4. The closure of the hearing was error under rules of court, applicable statute, and constitutional rights of public trial.

Over Appellant's objection and on Respondent's motion, the trial court closed the hearing to the public, including an associate of attorney Lacroix who was present as an observer. (RT 6:13-8:2). This was plain error under the rules of court and applicable statute and allowed court and counsel a free hand to divert the course of justice at will, even prejudicing this court's effective review of the hearing.

Rule 77(b), NRCP:

> "(b) Trials and Hearings; Orders in Chambers. All trials on the merits shall be conducted in open court and so far as convenient in a regular court room, except private trial may be had as provided by statute . . ."

NRS 125.080:

> "125.080 Trial of divorce action may be private. In any action for divorce the court shall, upon demand of either party, direct that the trial and issue or issues of fact joined therein be private, and

> upon such direction all persons shall be excluded from the court or chambers wherein the action is tried, except the officers of the court, the parties and their witnesses and counsel."

Respondent, of course, did not proceed under Chapter 125, but under Chapter 128, which has no provision for private trial. Appellant argues that such a provision would be unconstitutional in a proceeding to terminate fundamental rights. This proceeding was quasi-criminal. The fact that the Legislature has chosen to designate it "civil" cannot change its function as an accustory action with a goal of punishment for wrongdoing. In discussing the standard of proof, the Supreme Court in *Santosky v. Kramer, supra,* noted:

> "Notwithstanding 'the state's "civil labels and good intentions" . . . the court has deemed this level of certainty necessary to preserve fundamental fairness in a variety of . . . proceedings that threaten the individual involved with 'a significant deprivation of liberty' or 'stigma' ".
>
> 455 US at 756

A very recent decision of the Third Circuit Court of Appeals addressed as an "issue of first impression . . . whether the First Amendment secures to the public . . . a right of access to civil proceedings." In *Publicker Industries, Inc. v. Cohen* (3rd cir, April 30, 1984) 52 USLW 2641, the court examined the bases of the United States Supreme Court's public-trial decisions and found them equally applicable to civil proceedings, concluding that access to the courts is a fundamental right requiring that a compelling state interest exist and be articulated by a court before closing proceedings. Such a closure must be narrowly tailored to serve such compelling interest and a transcript

is not always an adequate substitute for public scrutiny of the trial. The court's findings as to reasons for closure must appear in the record.

Here, an associate of attorney Lacroix was among those excluded upon Respondent's naked motion and the court's vague reference to the best interests of the child. The associate, mistakenly identified as Ms. Casamajor, was actually California attorney Deborah Arbuckle, who had accompanied the inexperienced Lacroix to assist in logistics and unforeseen research and investigation; with such a connection to the case, her exclusion is hardly a narrowly-drawn exercise of a compelling state interest in secrecy. The closure order left no witnesses to what was to transpire.

An earlier United States Supreme Court, in *In Re Oliver* (1942) 333 US 257, noted:

> "The . . . distrust for secret trials has been variously ascribed to the notorious use of this practice by the Spanish Inquisition . . . [and] the English Court of Star Chamber . . . these institutions obviously symbolized a menace to liberty. In the hands of despotic groups each . . . had become an instrument for the suppression of political and religious heresies in ruthless disregard of the right of an accused to a fair trial. Whatever other benefits . . . [a public trial] may confer upon our society, the guarantee has always been recognized as a safeguard against any attempt to employ our courts as instruments of persecution. The knowledge that every criminal trial is subject to contemporaneous review in the forum of public opinion is an effective restraint on possible abuse of judicial power."
>
> 333 US at 268

Appellant is not ashamed of her unavoidable medical condition, which she has bravely and intelligently overcome

to live her life with dignity and pride. The trial court cast stigma upon her by presuming sensational evidence was in the offing. This was not a sexual or child abuse case in any sense of the terms. No sexual conduct appears in the record, aside from the repeated vague and invidious innuendo of Respondent and her counsel. (RT 22:15-26; 24:30-25:17; 40:1-44:10; 44:27-45:5; 176:11-26; 177:6-178:4; 179:6-180:22; 181:27-182:16; 183:21-185:5; 286:19-287:23; 313:17-318:9; 324:20-326:26; 332:8-333:25; 335:8-10; 336:6-19; 360:9-28). Respondent made no direct inquiry into Appellant's sex life, if any, yet presumed from the outset that Appellant lived a notorious "lifestyle" of gross perversion.

Due process requires a fair, impartial, and public trial. Respondent stacked the deck in pretrial orders, then cleared the courtroom of those who would have been eyewitnesses to the abuses of counsel. Such a situation shocks the conscience and appalls the legal mind; it clearly offends the Constitution. The closure of the trial alone requires reversal. Kafka could write no crueler scenario; Torquemada could conduct no more thorough Inquisition. The Star Chamber has no place in an American justice system.

The United States Supreme Court has not been altogether silent on closed civil trials. In *Richmond Newspapers, Inc. v. Virginia* (1980) 448 US 555, the Court pointed the way to the *Publicker* rationale:

> ". . . the trial judge made no findings to support closure; no inquiry was made as to whether alternative solutons would have met the need to ensure fairness; there was no recognition of any right under the Constitution for the public . . . to attend the trial."
>
> 448 US at 581-582

and

> "Whether the public has a right to attend trials of civil cases is a question not raised by this case, but we note that historically both civil and criminal trials have been presumptively open."
>
> id. at 580, fn 17

The court sealed the transcript of the *in camera* examination of Mary Daly. (RT 338:8-16). While the record appears to show this was done in the presence of counsel, Appellant's attorneys heard no such order. No motion to seal appears in the record, nor was Appellant afforded opportunity to object. What state interest allows a trial court to keep even the eyes of a reviewing court from what is apparently dispositive evidence? (CI 52:28-30). The gross misconduct of counsel charged by Appellant in chambers (CI 45:31-47:4) is quite completely concealed.

> ". . . in custody cases, if a trial judge decides to interview the children *in camera*, the entire proceedings should be taken . . . and made available for appellate review . . . any different construction would frustrate meaningful appellate review . . . The judge's subjective reactions to the responses . . . may be incorrect . . . a record of the hearing would protect the judge from any suspicions of unfairness or false accusations by . . . the losing party . . . depriving a litigant of the opportunity to explain or rebut, particularly where the children's answers may be the deciding factor in the . . . decision, deprives such litigant of due process . . ."
>
> *M.P. v. S.P.* (1979) 169 NJ Super 425, 404 A2d 1256, 100 ALR3d 604 at 617

B. Substantive Due Process

1. NRS Chapter 128 is void for vagueness as applied.

The essential substantive criteria of the trial court's inquiry are suspect. A number of cases have examined the

concept of "best interests of the child" in the termination context.

In *Alsager v. District Court* (DC Iowa 1975) 406 FSupp 10, a state court termination decision was challenged in a civil rights action. The opinion, affirmed on appeal (545 F2d 1137) noted the following:

a. Parents have fundamental liberty and privacy interests in their relationships with natural children. 406 FSupp at 16;

b. A state may not avoid vagueness by denominating the proceedings "civil". id. at 17;

c. The vague standard of "best interests" fails to give ample warning of proscribed conduct. id. at 17;

d. To sustain the burden of a compelling state interest, the consequences of termination must be found to be less harmful than those of continuation. id at 23

e. Notice of the proceedings must be specific factually and legally; a petition paraphrasing statutory language is procedurally unconstitutional. id. at 24.

Reference to the trial court's short decision (CI 50-53) shows the same lack of specificity that brought federal restraint in *Alsager*. Nowhere are the findings supported by evidence:

> "Due to circumstances brought about by her own actions and conduct, [Appellant], to date of the hearing, had been unable for whatever reason to put her life in a condition where it would be in the 'best interests' of Mary to have parental rights as to her." (CI 50:25-29)

What "circumstances"? What "actions and conduct"? What "reason"? What "condition"? What are Mary's "best interests"?

> "If the natural father is not capable for whatever reason to be a father for the child within the minimal acceptable standards, he is to be deemed unfit, unstable, or unqualified to have reasonable visitation rights as deemed not in the best interests of the child or for the child's welfare." (CI 51:19-24)

What "reason"? What standards are "minimal[ly] acceptable"? What is the evidence of instability? How does one "qualify" for parental rights?

> "It appears to this court that the situation here is not resolvable without hurting Mary deeply." (CI 52:20-21)

Where is the elimination of the counseling alternative —which has yet to be attempted—as a potential source of resolution?

Alsager listed three dangers of vague statutes: (1) lack of warning as to proscribed conduct; (2) overbroad official discretion; (3) undue inhibition of protected conduct. 406 FSupp at 18. The cure for vagueness is definitive narrowing construction by state courts. *Grayned v. City of Rockford* (1972) 408 US 104. This court should construe the "best interests of the child" standard as permitting termination only as a prerogative of the state upon a threshold showing of serious and unmitigable objective harm to the child. If that is done, this case must be reversed, remanded, and dismissed. Then, if Respondent wishes to pursue some protective limitation of Appellant's visitation rights, she can do so in modification of the exist-

ing custody decree. Such a construction would find accord with the limitations expressed by other high courts:

People in the Interest of C.S. (Colo 1980) 613 P2d 1304:

> Best interests of the child requires (1) a history of severe and continuous neglect by the parent sought to be terminated; (2) a substantial probability of specific future harm; (3) that continuation of the relationship can under no reasonable circumstances benefit the child;

Matter of Swartzfager (Ore 1981) 290 Or 799, 626 P2d 882:

> Courts should hesitate to terminate parental rights for "alienation" of parent-child relationship, regardless of whether parental conduct primarily caused such alienation;

In Re Castillo (Utah 1981) 632 P2d 855:

> ". . . a child is not a mere pawn of the state to be dealt with solely on the basis of what public officials, or even the courts, may believe is in the child's best interests . . ."

and

> "when it plainly appears that there is such . . . deficiency . . . in the parent-child relationship that the values inherent therein are almost entirely absent, the law recognizes the need and provides the means for the termination of parental rights."

Matter of Doe (New Mexico 1982) 98 NM 198, 647 P2d 400:

> The court may not balance the backgrounds of the parties and decide which party may provide the "better" environment in termination actions.

Respondent and the trial court have applied the relative considerations of custody cases to the drastic and irrevocable decision to terminate fundamental rights. This

court must define "best interests of the child" narrowly. Construed as a remedy of last resort, termination is clearly misapplied here.

2. A state may not grant a private right to petition for the termination of another's fundamental rights.

a. Judicial enforcement of private prejudice violates the Fourteenth Amendment.

In *Shelley v. Kraemer* (1948) 334 US 1, judicial enforcement of racially restrictive covenants in residential deeds was sought and granted by Missouri courts. The United States Supreme Court reversed, holding that, although private acts of discrimination are beyond the reach of the Fourteenth Amendment, the state could not give effect to such prejudice through judicial enforcement of discriminatory agreements.

The Court has spoken recently of *Shelley* in the custody context. In *Palmore v. Sidote* (April 25, 1984) 44 CCH SCt Bull B 2424, 52 USLW 4497, child custody had been changed because of the mother's racially mixed remarriage and the father's assertion of harmful stigma arising therefrom:

> "Private biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect."
>
> 44 CCH SCt Bull B 2428

Appellant submits that, contrary to her fundamental parental rights, the trial court has given effect to the private prejudices of Respondent. (RT 260:1129; 261:21-27; 262:16-263:27; 265:16-266:7). The trial court has clearly indulged not a legal judgment that Appellant presents actual or threatened harm to her child, but a value judgment that Appellant is not "normal", whatever that is. (CI 51:27-30). The white citizens of Missouri doubtless felt it

was not "normal" for blacks to live among them and agreed to exclude the latter; more than thirty years ago, the Supreme Court forbade judicial assistance of private prejudice.

The Court in *Santosky v. Kramer, supra,* noted that termination actions often leave "determinations unusually open to the subjective values of the judge" (455 US at 762):

> "Because parents subject to termination proceedings are often poor, uneducated, or members of minority groups . . . such proceedings are often vulnerable to judgments based on cultural or class bias."
>
> 455 US at 763

The trial court has expressed a bias for "normal" persons, without definition. Appellant submits that this is cultural bias.

b. Termination of parental rights in a post-decree contest between divorced spouses violates res judicata and the Fourteenth Amendment.

Santosky v. Kramer concerned the power of the state to initiate proceedings to terminate the fundamental parental rights of parents deemed by its agencies to be incapable of proper parenting. Appellant has not found a single case in the pacific Reporter where parental rights were terminated in other than the following circumstances:

1. Child abuse of serious neglect cases, in which the children are taken from the parent(s) in an exercise of the inherent *parens patriae* power to intervene where overt harm is palpable, (see, for example, *Pima County Juvenile Actions Nos. S-826 & J-59015* (1982) 132 Ariz 33, 643 P2d 736; *Matter of Doe* (1982) 98 NM 198, 647 P2d 400; *In Re James M.* (1976) 65 CalApp3d 474, 135 CalRptr 222);

2. Nonconsent adoptions, usually by stepparents or foster parents, under stringent requirements of neglect, abandonment, or unfitness, (see *Carson v. Lowe* [*In Re Carson*] (1961) 76 Nev 446, 357 P2d 591; *Casper v. Huber* (1969) 85 Nev 474, 456 P2d 436);

3. Delinquency cases, in which criminal conduct by a minor is found to be the result of grossly inadequate parenting;

In the first category are numerous sickening examples of the helplessness of children confronted by physical violence, sexual abuse, or parental ignorance of or inattention to the basics of hygiene, nutrition, or social training. These cases are not pleasant reading and have nothing whatsoever to do with Appellant's situation.

In the second category, adoptions, are cases where a strong presumption in favor of a stable home life guides a policy judgment between natural parents who have become estranged from their children (often by incarceration or abandonment), and those who have provided a stable home life in lieu of natural parents. Respondent does not seek to replace a willfully absent parent with an appropriately concerned surrogate, but rather simply to eliminate a former spouse she deems unfit. Such a course is not one of Respondent's prerogatives.

The third category does not apply to Mary Daly, who is a good citizen by any standard. (RT 49:16-20; 50:4-25; 91:2-8; 92:26-28; 93:5)

In more than one hundred termination cases, Appellant has found none based on the kinds of value judgments typically made in custody cases, where the "better" or "more normal" home often prevails. (see, for example, *Painter v Bannister* (1966) 258 Iowa 1390, 140 NW2d 152,

158, cited by this court in reversing a termination decree in *Chapman v Chapman* (1980) 96 Nev 290, 607 P2d 1141). THIS IS AN ACTION TO PERMANENTLY SEVER A FUNDAMENTAL RELATIONSHIP OF PARENT AND CHILD. It cuts off Mary Daly from any right to support and inheritance (*State Welfare Division v Vine* (1983) 99 Nev 270, 662 P2d 295) and leaves a loving natural parent in a legal limbo as to the property set aside in the dissolution decree. Appellant dearly wants to be a parent, to support, love and nurture Mary; she has been deprived of the opportunity to do so. It is this perversion of child protection statutes of which she complains.

NRS Chapter 128 bristles with the indicia of neglected-child laws: "welfare administrator", "investigation", "foster care", "case plan". It clearly applies to different situations than interspousal conflict over custody and visitation.

Absent any indication in Chapter 128 that is was intended to supersede final dissolution custody decrees without a threshold requirement justifying state action, Appellant argues that the statute violates the Fourteenth Amendment as applied to a post-decree conflict where the challenged parent has consistently sought a nurturing relationship which has been frustrated by the custodial parent and local authorities; the courts and law enforcement have enforced the private prejudices of Respondent and have thereby violated liberty, property, and privacy interests of Appellant.

The application of the state-action threshold also makes clear the *res judicata* problem here: if a stepparent, foster parent, or welfare official enters the controversy, the iden-

tity of parties and interests requirement of *res judicata* ceases to apply and the issues raised by a new party may be addressed. The second *Turner v Saka* case (1976) 92 Nev 108, 546 P2d 233, shows the consent requirement in adoption cases. It is only in nonconsent adoptions or neglect/dependency cases that the issues tried herein—as though in an ordinary civil action—even become justiciable; the entry of new parties and the policy bases of either adoption or protection remove the bar of res judicata.

3. Sex reassignment under medical supervision is protected conduct.

A number of cases have addressed the power of the state to prohibit or discourage sex reassignment through penal or civil law; many states have enacted ameliorative statutes and regulations to ease the transition. It is settled law that sex reassignment under medical supervision is protected conduct.

a. Penal sanctions: laws against cross-dressing have been held violative of liberty and privacy interests. *Wallace v City of Chicago* (1978) 75 Ill2d 525, 389 NE2d 522; *Doe v McConn* (DC Tex 1980) 489 F Supp 76. Each held that the trial period of the preoperative transsexual is medically necessary and a private decision between doctor and patient. Respondent and the trial court clearly want to make Appellant's medical decisions for her, under penalty of losing fundamental rights. The state may not penalize what it cannot forbid.

b. Family law: *M.T. v J.T.* (1976) 140 NJ Super 77, 355 A2d 204 found a postoperative male-to-female transsexual wife a woman for alimony purposes and is a good analysis of the criteria to be applied to transitional individuals; In *Christian v Randall* (Colo App 1973), 516 P2d 132, cited to the trial court at CI 32:5-

17), a female-to-male transsexual mother who had married a woman had her custody challenged by the father on grounds of an unwholesome environment. The decision stressed the need for individualized decision-making and avoidance of arbitrary notions of unfitness. It is as squarely on point as any authority herein.

c. A very recent federal employment discrimination case deserves scrutiny, because it is the first in the area to really address the arbitrary and invidious burdens unenlightened society heaps upon the daily lives of transsexuals. *Ulane v Eastern Airlines* (DC Ill 1984) 581 FSupp 821 involved a pilot with 12 years service who underwent reassignment during a leave of absence and was terminated when she attempted to return to work. In a long, factual opinion, District Judge Grady blasted the airline for manifest hypocrisy:

> ". . . Eastern made no effort whatsoever to determine what the situation was . . . They simply did not have enough information to take the position that they did: namely, that you can categorize transsexuals across the board as persons who would represent a safety problem in a stressful situation. That generalization is no more true of transsexuals than it would be of people who are left-handed of who are dyed-in-the-wool Republicans. It is no escape from that fact to say, 'Well, we just do not know.' Ignorance, prejudice, discrimination, and hatred have throughout history been justified by, 'We do not know; we cannot take a chance.'" 581 FSupp at 837

Thus, when the trial court finds: "There is is serious risk of physical, mental and emotional harm to this child should we take a chance. The court must face reality in this situation." (CT 52:25-27), Appellant complains of judicial ignorance, prejudice, discrimination, and hatred. The trial court has not faced reality, but given in to irrational fear.

Judge Grady: "... it cannot be said with any rationality that all transsexuals are unsafe airline pilots." 581 FSupp at 837

The Trial Court: "Mary doesn't need to be exposed to a person who has what Dr. Pauly calls a 'gender identity' problem ..." CI 52 at 10-12

Since transsexualism is defined as a disorder of gender identity, or one's inner sense of being male or female, the trial court's sweeping fiat of parental exclusion is definitive arbitrariness; it is a deficient reason for termination.

d. Legislative responses: California and a number of other states have enacted statutes to facilitate the public recordkeeping problems transsexuals face. *California Health & Safety Code Sections 10475-10479* allow a postoperative transsexual to file for a new birth certificate reflecting his or her new name and sex. California Driver's License Examiner's Manual Section 21301 allows a preoperative transsexual to get a license in the new name and sex with a letter from a qualified professional.

A transsexual's reassignment process is conduct protected by constitutional decisions, family law decisions, and ameliorative statutes and regulations. The trial court has arbitrarily attached an onerous penalty to that process. Nevada is without right to so limit Appellant's privacy and liberty.

* * *

Supreme Court, U.S.
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No. 86-3

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1986

SUZANNE LINDLEY DALY,
Petitioner,

v.

NAN TOEWS DALY,
Respondent.

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEVADA

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SUZANNE LINDLEY DALY,
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NAN TOEWS DALY,
Respondent.

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEVADA

Respondent Nan Toews Daly hereby opposes the Petition for a Writ of Certiorari to the Supreme Court of the State of Nevada.

COUNTER STATEMENT OF THE CASE

The Statement of the Case as set forth in the Petition is an emotional, argumentative and factually distorted presentation, relying on evidence favoring Petitioner's contentions while ignoring evidence relied upon by the Trial Court which supported its ruling. Respondent adopts and relies upon the statement of facts as set forth by the Nevada Supreme Court in its Opinion, (App. 1, pp. 1-3; 102 Nev. Adv. Op. No. 20 (1986) which it found to be amply supported by the Trial Court Record before it.

REASONS FOR DENIAL OF WRIT

THE DECISION OF THE NEVADA SUPREME COURT IS BASED ON INDEPENDENT GROUNDS OF STATE LAW, AND THE PETITION FOR A WRIT OF CERTIORARI FAILS TO PRESENT A SUBSTANTIAL FEDERAL QUESTION FOR REVIEW

Although the Petitioner strains mightily to find constitutional grounds upon which to challenge the decision of the Nevada Supreme Court, the Record simply does not support her[1] effort. By characterizing the decision of the Trial Court and the Nevada Supreme Court as being premised solely upon her transsexualism or gender dysphoria, the Petitioner alleges that the termination of her parental rights violated rights protected by the United States Consitution, to-wit: (1) her rights as a parent were denied without Due Process of Law by a ruling which based termination thereof solely upon "the best interest of the child without a showing of parental unfitness"; (2) the Nevada statute (N.R.S. 128.105) which permits the termination of parental rights is "void for vagueness" in violation of the Due Process Clause; and (3) the statute as applied denied Petitioner the Equal Protection of the Law.

The immediately obvious fallacy in Petitioner's analysis and argument is that both the decision of the Trial Court and the decision of the Nevada Supreme Court carefully point out that the Petitioner's starting premise is false—*i.e.* the termination of Petitioner's parental rights was not based on the fact of her gender dysphoria as she asserts, but rather was based upon the effect of her lifestyle on the mental and emotional health of the child. The order of termination was not to punish Petitioner for her condition as she claims, but rather to protect the child from the effects of such condition on her child's welfare. If a mother were suffering from such acute alcoholism that she abused her child and neglected her welfare, a resulting order of termination would not be punishment for the alcoholism, but rather an effort to protect the child from the effects of such condition.

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[1] Use of the feminine pronoun is in accordance with the Petition at the request of Petitioner (footnote 2, page 3 of Petition)

The fact that the Trial Court focused its inquiry on the effects of Petitioner's condition of the child rather than basing its opinion on the fact of the condition itself is manifest throughout its written Decision, and summarized in the following language concluding the opinion:

> "The Court is abundantly aware that we have to be careful when we tamper with fundamental rights, constitutional rights, and here, by natural rights, i.e., mother and father.
>
> "There is a suggestion in counsel's argument that Respondent is being discriminated against because she is a transsexual. This Court is keenly aware of this situation and endeavors to avoid it in rendering a decision on the facts.
>
> "The record fairly discloses that the surrounding circumstances in the situation here involved is now adversely affecting Respondent's relationship with the child and impairs the child's emotional development and the child is not prepared to cope with it. The evidence shows that the anxiety and confusion created over this termination proceeding is not to the advantage of this child." (App. 26)

Similarly, the focus of the Nevada Supreme Court on the effects of Suzanne's condition and resulting lifestyle as opposed to the mere fact of her transsexualism is clearly discernible from its opinion. Wherein it states:

> "The trial court was fully aware of the seriousness and finality of a decree terminating parental rights, noting that such a remedy should be applied with caution. The court carefully considered the record and found abandonment and risk of serious mental and emotional harm. The court also found Suzanne to be a selfish person whose own needs, desires and wishes were paramount and were indulged without regard to their impact on the life and psyche of the daughter, Mary.

The Supreme Court then reviewed the impacts of Suzanne's lifestyle on Mary, with particular emphasis on Mary's reactions thereto, and concluded:

> "The resulting equation does not bode well for the emotional health and well-being of the child. This Court can perceive no basis for such disruption of Mary's life. Nor do we see the necessity for inflicting a continuing sense of instability and uneasiness on this child. As noted previously, when Mary reaches the age of majority she can decide whether to reinstate a relationship with Suzanne. In the meantime, given the circumstances concerning Mary's view of Suzanne and the extent of her opposition to further ties with a vestigial parent, it can be said that Suzanne, in a very real sense, has terminated her own parental rights as a father. It was strictly Tim Daly's choice to discard his fatherhood and assume the role of a female who could never be either mother or sister to his daughter." (App. 8-9)

In view of the considerations which led to the respective decisions of the Trial Court and the Supreme Court of the State of Nevada, it is respectfully submitted that the issues herein involved are uniquely issues of state law in an area in which this Court has previously encouraged state law innovation and experimentation without interference by the federal courts. *See Lehman v. Lycoming County Children Services* Agency, 458 U.S. 502, 73 L.Ed.2d 928 (1982), where, in upholding the denial of federal habeas corpus relief to challenge an order terminating parental rights, this Court said: [458 U.S. at 513]

> "The State's interest in finality is unusually strong in child custody disputes. The grant of federal habeas would prolong uncertainty for children such as the Lehman sons, possibly lessening their chances of adoption. It is undisputed that children require secure, stable, long-term, continuous relationships with their parents or foster parents. There is little that can be as detrimental to a child's sound development as uncertainty over whether he is to remain in his current home under the care of his parents or foster parents, especially when such uncertainty is prolonged. Extended uncertainty would be inevitable in many cases if federal courts had jurisdiction to relitigate state custody decisions."

See also, *Santosky v. Kramer*, 455 U.S. 745, 71 L.Ed.2d 599, 102 S.Ct. 1388 (1982), where the dissenting justices pointed out: [455 U.S. at 770-771]

> "I believe that few of us would care to live in a society where every aspect of life was regulated by a single source of law, whether that source be this Court or some other organ of our complex body public . . . If ever there were an area in which federal courts should heed the admonition of Justice Holmes that 'a page of history is worth a volume of logic' it is in the area of domestic relations. This area has been left to the States from time immemorial, and not without good reason . . .
>
> * * *
>
> "State intervention in domestic relations has always been an unhappy but necessary feature of life in our organized society. For all of our experience in this area, we have found no fully satisfactory solutions to the painful problem of child abuse and neglect. We have found, however, that leaving the States free to experiment with various remedies has produced novel approaches and promising progress.
>
> "Throughbout this experience, the Court has scrupulously refrained from interfering with State answers to domestic relations questions. 'Both theory and precedents of this Court teach us solicitude for State interests, particularly in the field of family and family-property arrangements.' *United States v. Yagell*, 382 U.S. 341, 352, 86 S.Ct. 500, 507, 52 L.Ed.2d 404 (1966)."

The case at bar is a classic demonstration of the validity of the foregoing observation, since a comparison of the majority and dissenting opinions of the Nevada Supreme Court (App. 1-20) shows that all of the Justices recognized the danger to Mary's emotional health as a result of the Petitoner's life-style, and all agreed that there should not be visitation at this time in the child's development. The Justices parted company only with regard to the appropriate remedy, the dissenting Justices expressing the opinion that a less drastic and final remedy than termination of parental rights might be fashioned. This is precisely the

type of experimentation by the administrators of state law which this Court has held should be encouraged without interference by the federal courts. The United States Supreme Court has recognized, however, that the parent-child relationship is a fundamental one which is protected by the Due Process Clause, particularly when it is the State which seeks to destroy the relationship. This is particularly true in the area of procedural Due Process rights, such as the extent of the burden of proof (*Santosky v. Kramer*, 455 U.S. 745, 753 (1982) or the right of an indigent parent to counsel. (*Lassiter v. Department of Social Services*, 452 U.S. 18 (1981). However, it is submitted, as set forth in detail below, that protected constitutional rights have not been violated by the decision of the Nevada Supreme Court in this case.

1. The Nevada Courts Applied the Appropriate Substantive Standard in Reaching Its Decision

The first contention which the Petitioner makes is that the State of Nevada terminated her parental rights without a finding of parental unfitness, solely on the guideline of the "the best interests of the child", relying on language of this Court in *Quilloin v. Walcott*, 434 U.S. 246 (1978) which is quoted on pages 12 and 13 of the Petition. The quoted language, however, is taken completely out of context by omitting the qualifying language which followed it, which qualifying language applies with equal force to the facts presented in the case at bar. What this Court actually held in *Quilloin v. Walcott, supra,* was stated thusly: [434 U.S. at p. 255]

> "We have little doubt that the Due Process Clause would be offended '[i]f a State were to attempt to force the breakup of a natural family, over the objections of the parents and their children, without some showing of unfitness and for the sole reason that to do so was thought to be in the children's best interests.' *Smith v. Organization of Foster Families,* 431 U.S. 816, 862-863, 97 S.Ct. 2094, 2119, 53 L.Ed.2d 14 (1977) (Stewart, J. concurring in judgment). But this is not a case in which the unwed father at any time had or sought actual or legal custody of his child. Nor is this a case in which the proposed adoption would place the child with a new set of parents with whom the child had never

> before lived. Rather, the result of the adoption in this case is to give full recognition to a family unit already in existence, a result desired by all concerned, except applellant. Whatever might be required in other situations, we cannot say that the State was required in this situation to find anything more than that the adoption, and denial of legitimation, was 'in the best interests of the child.' "

Thus, the actual holding of the *Quilloin* case was that where the State does not seek to disrupt an existing family unit, and the affected parent has not previously had or sought actual or legal custody of the child, the appropriate quideline, which may be the sole quideline in those limited circumstances, is "the best interest of the child". That, of course, is precisely the situation presented at bar. The Nevada Supreme Court noted that the family unit comprised of Mary, her mother and grandmother, is a sound, stable and loving nurturing environment for the child, that the Petitioner's efforts to acclimate Mary to his "alternative lifestyle" was disruptive and emotionally damaging to the child, that the child did not want to have anything to do with Petitioner, and was at risk of severe emotional damage if visitation was forced upon her. It is submitted that the guidelines utilized by the Nevada Supreme Court and the trial court were fully in accord with the statute (N.R.S. 128.105) and the governing principles of Due Process of Law, and that with regard to the substantive Due Process issue, no substantial federal question is presented for review by this Court.

2. The Nevada Statute Is Not "Void for Vagueness"

The Petitioner's next contention is that N.R.S. 128.105 is "void for vagueness" because it does not spell out with precision exactly what types of conduct might be determined to be detrimental to the welfare of a child, and therefore permitted her to suffer the punitive consequences of termination of her parental rights as the result of her decision to change her sex without giving her sufficient prior warning of such consequences. No authorities are cited in which any court has held that a statute similar to N.R.S. 128.105 which authorizes a State to terminate parental rights where there is "[r]isk of serious physical, mental or emotional injury to the child if he were returned to, or remains in, the home

of his parent or parents" (N.R.S. 128.105(4) or where the parent has exerted only token efforts "[t]o eliminate the risk of serious physical, mental or emotional injury to the child". (N.R.S. 128.105(5)(d)) This Court has not specifically addressed this issue, but it has been addressed by numerous lower courts, the vast majority of which have held that similar language is sufficiently definitive, that an attempt to enumerate specific types of abuse and neglect would create the risk of omission of some types of abusive conduct, and that it is common knowledge among most parents as to the type of conduct which can be considered harmful to the welfare of a child. See cases collected at Annotation, 22 A.L.R.4th, 774, 792-798 (1983). The N. Carolina Appellate Court expressed the generally-accepted and prevailing rule in *Re Biggars,* 50 N.C.App. 332, 274 S.E.2d 236, 22 A.L.R.4th 766 (1981) in the following language:

> "G.S. 7A-278(4). Our Court has not found it difficult to give a precise meaning to this definition of a neglected child in particular cases by analyzing the factual circumstances before it and weighing the compelling interests of the State with those of the parents and child. (Citations omitted) Viewed in this light, G.S. 7A-289.32(2) is not vague because the terms used in G.S. 7A-278(4) are given a precise and understandable meaning by the normative standards imposed upon parents by our society, and parents are, therefore given sufficient notice of the type of conduct that constitutes child neglect in this State. See 17 Ariz. L. Rev. 1055, 1070 (1975).
>
> * * *
>
> "We note that vagueness challenges to similar statutes have been increasingly made across the nation, but they have been almost uniformly rejected. See Comment, Application of Vagueness Doctrine to Statutes Terminating Parental Rights, 1980 Duke L. J. 336, 341; Day, Termination of Parental Rights Statutes and the Void for Vagueness Doctrine; Successful Attack on the Parens Patriae Rationale, 10 J. Fam. L. 213, 232 (1977-78); 70 Columbia L. Rev. 465, 469 (1970) . . . An 'impossible standard of legislative clarity' would be inappropriate in cases involving child care and

> custody. 'What might be unconstitutional if only the parent's rights were involved is constitutional if the statute adopts legitimate and necessary means to protect the child's interests.' *State v. McMaster,* 259 Or. 291, 296, 486 P.2d 567, 569 (1971) (rejecting a vagueness claim to the Oregon statute for termination of parental rights). If (sic) Accord, *In re Daniel H.* 591 P.2d 1175 (Okl. 1979) This context requires flexibility in the weighing of each case's facts in order to give the child, as well as the parent, the highest form of due process . . ."

See also, to the same effect, *Stjernholm v. Mazaheri,* 180 Colo. 352, 506 P.2d 155 (1973) and *Re F.I.D.* (Pa. Super. 1983) 464 A.2d 419.

As Petitioner recognizes, a statute which may on its face be vague nonetheless does not violate Due Process if it has been construed by the State in such a manner as to give it sufficient precision. (*Kolender v. Lawson,* 461 U.S. 352, 355; *Hoffman Estates v. Flipside, Hoffman Estates Inc.,* 455 U.S. 489, 494 n.5 (1982). The Nevada statute has been so construed. In *Cloninger v. Russell,* 98 Nev. 597, 655 P.2d 528 (1982), the Nevada Supreme Court judicially adopted the clear and convincing evidence standard of proof in compliance with *Santosky v. Kramer,* 455 U.S. 745 (1982). In *Champagne v. Welfare Division of the Nevada State Department of Human Resources,* 100 Nev. 646, 691 P.2d 849 (1984), the Nevada Supreme Court divided the consideration of termination of parental rights into a two-step process, first requiring "jurisdictional grounds" which are the factors enumerated in the statute, N.R.S. 128.105, including the grounds involved herein as set forth in N.R.S. 128.105(4). Assuming that the jurisdictional grounds are established, i.e. that there is clear and convincing evidence of neglect, abuse or damage to the physical, mental or emotional well-being of the child, then the Court must consider the "dispositional" remedy, i.e. whether termination of parental rights or some other remedy is more appropriate under the specific facts of the case. In considering "jurisdictional" grounds, i.e. the statutory bases authorizing termination of parental rights, the Court very carefully delineating the type or character of conduct which could lead to

the drastic consequence of termination of parental rights, stating: [100 Nev. at p. 648-649]

> "For example, a judicial determination that a child has been neglected may call for varying degrees of state intervention, ranging from mild reprimand to permanent termination of parental rights. Neglect is a relative term applied to a child who 'lacks the proper parental care by reason of [parental] fault.' N.R.S. 128.014. Although it is difficult to define 'proper', it is probably true that all parents are at one time or another guilty of neglecting to give their children 'proper' care. To provide a jurisdictional basis for termination, neglect must be serious and persistent and be sufficiently harmful to the child so as to mandate a forfeiture of parental rights. In such a case a parent may be adjudged to be *unsuitable* to maintain the parental relationship, and therefore, to *deserve* to lose it. (Emphasis by Court)
>
> "The same principles apply to the jurisdictional ground of unfitness. Unfitness is the other side of the neglect coin. Neglect defines a condition of the child; unfitness describes a condition of the parent. A neglected child is one who does not receive '*proper*' care; an unfit parent is one who fails to provide a child with '*proper*' care. Again; all parents are guilty of failure to provide proper care on occasion; and a parent does not deserve to forfeit the sacred liberty right of parenthood unless such unfitness is shown to be severe and persistent and such as to render the parent *unsuitable* to maintain the parental relationship.
>
> "In like manner, abuse of a child may or may not render a parent unsuitable to be a parent. N.R.S. 128.105 lists as a ground or consideration for termination '[r]isks of serious physical mental or emotional injury to the child if he were returned to, or remains in the home . . . ' Such a risk may be mitigated, and a child may be safely returned to the home; or the risk may be of such magnitude and persistency as to render the parent unsuitable and justify forfeiture of parental rights."

The Court further amplified, in footnotes 5 and 6, pp. 648-649, on the term "unsuitability" as being a condition of persistent fault or incapacity resulting in an irremedial ability to function as a proper parent. It is submitted that the careful definition by the Nevada Supreme Court gives sufficient definition to the statutory jurisdictional grounds for termination to provide full and fair warning to parents of the type of conduct which can lead to termination of parental rights. There is no requirement that the statute specifically state that sexual misconduct, or unacceptable "alternative" lifestyles, or commission of a felony, or any other specific conduct will or may lead to such consequences.

In an illuminating demonstration of the "selfishness" towards his own needs irrespective of the consequences to his daughter, the Petitioner contends that she was not forewarned that following medical advice to undergo sexual reassignment surgery could result in the loss of her parental rights. As noted above, it was not her gender dysphoria or his sexual reassignment surgery which led to the termination of her rights; it was the manner in which she conducted her lifestyle and the environment to which she subjected the child while she was with her which resulted in the severe emotional trauma to the child. Even when the prospect of termination of her rights became a reality, she still insisted on her right to expose the child to her "friends" and insist that the child accept them, understand them and mingle with them. This lifestyle created a persistent and apparently irremediable situation of neglect and mental and emotional abuse of the child which Petitioner cannot or will not acknowledge because of her focus on her own desires irrespective of how they affect the child. The Statute as construed by the Nevada Supreme Court in the *Champagne* case gives clear warning that such conduct may lead to the termination of parental rights if that remedy is deemed to be in the best interests of the child. Significantly, both the majority and the dissenting Justices in the case at bar found that the jurisdictional, i.e. statutory, grounds for termination were established by the record in the case at bar—they differed as to the dispositional remedy only.

It is respectfully submitted that the Petitioner's gender dysphoria and her decision to undergo sexual reassignment sur-

gery were matters which would not necessarily have led to the termination of her parental rights, if they had not had such a disruptive effect on the emotional and mental health of the child. However, by reason of the Petitioner's own fault in placing her rights and choices paramount to the rights and interests of the child, she created a situation which rendered her unsuitable to function as a proper and acceptable parent. The statute as construed gave her sufficient warning of such potential consequences, and having made the choice to conduct her lifestyle in a manner inimicable to the interests of the child, she has been properly held to have forfeited her right to continue to be a parent to such child. Whether termination or her rights or some lesser consequences was an appropriate remedy under the circumstances is something that can only be determined on the specific facts of the case, and is uniquely an issue of state law which does not involve any federal question. The majority of the Justices of the Nevada Supreme Court felt that under the circumstances, in light of Mary's feelings and reactions, termination of Petitioner's rights was the appropriate remedy. This Court should not, by its own precedents, interfere with that determination.

3. The Nevada Statute, as Applied, Did Not Deprive Petitioner of the Equal Protection of the Law

The final contention of the Petitioner is that the order terminating her rights denied her the equal protection of the law because a classification which permits a transsexual's rights to be terminated because of such transsexualism if an "irrational classification". Again, the Petitioner's focus is distorted, because the termination order was not because of her gender dysphoria as she repeatedly claims, but rather because of its effect on the child.

This Court has not directly addressed the issue of "transsexualism" in terms of the Equal Protection Clause, but it has been frequently recognized in the lower federal courts that "transsexuals" are not a suspect classification, and that therefore only a rational basis or nexus is required to justify such classification if in fact it has occurred. The federal courts have been almost unanimous in holding that no cause of action for discrimination against a transsexual exists under Title 42 U.S. 1981, 1983 or 1985, or under Title 42 U.S.C. 2000(e)2. (*Grossman v. Bernard's Town-*

ship Board of Education, (D.C.N.J. 1975) 11 CCH EPD ¶10686, affirmed (3rd Cir.) 538 F.2d 319, certiorari denied, 429 U.S. 897, 50 L.Ed.2d 181, 97 S.Ct. 261 (holding that dismissal of a teacher after sexual reassignment surgery did not state a cause of action under Title 42 U.S.C. § 1981), *Powell v. Reads, Inc.* (D.C. Md. 1977) 436 F.Supp. 369 (holding that discrimination against transsexuals did not state a claim under Title VII of the Civil Rights Act of 1964, 42 U.S.C.S. § 2000(e)2); *Holloway v. Arthur Andersen & Co.* (9th Cir. 1977) 566 F.2d 659 (holding that Title 42 U.S.C. §2000(e)2 did not apply to transsexuals and did not raise an Equal Protection problem since a rational basis was all that was required inasmuch as transsexuals are not a suspect classification); *Childers v. Dallas Police Department*, (D.C.N.D. Tex. 1981) 513 F.Supp. 134 (holding that discrimination against a homosexual by denying promotion was rationally justified by the fact that the tension between him and other officers who detested homosexuality would affect his effectiveness as an officer).

Further, federal courts have recognized that discrimination against homosexuals is not violative of the Equal Protection Clause provided there is a rational basis for the action taken related to such homosexuality. (*See McConnell v. Anderson*, (8th Cir. 1971) 451 F.2d 193, certiorari denied, 405 U.S. 1046, 31 L.Ed.2d 588, 92 S.Ct. 1312; *Gayer v. Schlesinger*, 160 App. D.C. 172, 490 F.2d 740, amd. 161 App. D.C. 216, 494 F.2d 1135 (1975); *McKeand v. Laird*, (9th Cir. 1973) 490 F.2d 1262; *Marks v. Schlesinger*, (D.C. Cal. 1974) 384 F.Supp. 1373; *Berg v. Clayton*, (D.C.D.C. 1977) 436 F.Supp. 76.

The Nevada statute does not attempt in any way to classify the types of conduct which may lead to termination of parental rights, or to indicate that any particular class membership will cause a termination of such rights. The statute applies to conduct and conditions created by parental unfitness or abuse and by child neglect, regardless of whether the parent who is responsible is heterosexual, homosexual, transsexual, bisexual or even asexual. Deviant or unacceptable sexual conduct may lead to termination of parental rights if, but only if, it creates a persistent and irremediable risk to the emotional welfare and mental health of

the child, and it makes no difference whether such conduct is committed by a heterosexual female, a homosexual male, or a transsexual. It is the effect on the child which matters. Thus in the *Champagne* case, the Nevada Supreme Court upheld the termination of the Champagnes' parental rights, even though they appeared to be a sexually normal heterosexual couple, because the environment of drug abuse, child abuse, lack of supervision and the violent temper of Mr. Champagne created a substantial risk of physical, mental and emotional injury to the children. (100 Nev. at p. 660-661) Similarly it upheld the termination of the rights of a heterosexual mother who was a drug addict and who persisted in bringing unsuitable people into the home. (100 Nev. at p. 662) It is thus clear that the statute is applied evenhandedly to all classes of people, including transsexuals, who create atmospheres, environments, and conditions which render them unsuitable to be parents. That is what the Petitioner had done, as is clearly manifested from the record of emotional suffered by Mary when she has been required to visit with him, and he has been treated no differently than anyone else would have been under the circumstances. His sexual preferences or condition are relevant only to the extent that they contributed to the creation of such conditions, and it is therefore respectfully submitted that no substantial federal question regarding the Equal Protection of the Law has been raised by his Petition.

It should also be noted that this case does not involve termination at the instigation of the State, thereby aligning all the power and authority of the State against the Petitioner, as was the case in the authorities upon which Petitioner relies. This action to terminate parental rights was instituted by Respondent, the custodial parent, and was defended by Petitioner with the full assistance of counsel and expert witnesses. The Supreme Court of Nevada found that the Trial Court's findings of fact were amply supported by the record. The Petitioner has had a full and fair opportunity to defend his parental rights with all of the procedural advantages which the Due Process Clause guarantees, plus additional protections guaranteed by the statutes. His case was carefully considered by the Trial Court and the Supreme Court of Nevada in light of applicable principles of state law. This case is similar to *DiStefano v. DiStefano*, 60 App. Div. 2d 976, 401

N.Y.S.2d 636, 6 A.L.R. 4th 1291 (1978) in which the Court noted:

> "Despite the efforts of the wife to raise due process, equal protection and other constitutional questions concerning her claim to sexual privacy free from governmental interference, no such issue is presented here. Although she is an admitted practicing homosexual, the trial court found that homosexuality *per se*, did not render her unfit as a parent. The court made no effort to restrict her preferred sexual activity, although deviate sexual intercourse remains a crime in this state. . . ."

CONCLUSION

Although Petitioner attempts to inject constitutional issues into this case, it is abundantly clear that the facts and circumstances reflected by the Record amply demonstrate the absence of such issues or any substantial federal questions presented for review in this Court. This case is a classic traditional case of the application of state law principles to a state law issue, and it is respectfully submitted that the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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Supreme Court, U.S.
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No. 86-3

In The
Supreme Court of the United States
October Term, 1986

---o---

SUZANNE LINDLEY DALY,
Petitioner,

vs.

NAN TOEWS DALY,
Respondent.

---o---

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEVADA

---o---

PETITIONER'S REPLY TO THE BRIEFS OF RESPONDENT AND AMICUS CURIAE

---o---

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PETITIONER'S REPLY TO THE BRIEFS OF RESPONDENT AND AMICUS CURIAE

—Introduction—

This case is about the permanent destruction of a natural parent's rights vis-a-vis her child, rights this Court has deemed "far more precious...than property rights." *Stanley v. Illinois,* 405 U.S. 645, 651 (1972). After a parody of a trial characterized by medieval hysteria and hyperbole, the courts of the State of Nevada issued a judgment severing all legal ties between Suzanne Daly and her daughter, Mary—based solely upon the conclusion of these courts that Mary's "best interests" would be jeopardized by having a parent who suffered from gender dysphoria and received medically-prescribed surgical treatment for that condition. That this case implicates the most fundamental rights guaranteed by the Constitution cannot intelligently be disputed.

Respondent refuses to acknowledge what this case is really about. She studiously attempts to blur the obvious distinction between a medical condition which affects one's gender and that which she describes as "sexual misconduct" or "sexual preference." Opposition, pp. 11, 13, 14. No doubt respondent's hysterical reaction to the condition of gender dysphoria, like that of the Nevada courts, reflects broadly-held societal prejudices. But the fact that prejudices exist in our culture cannot justify the Nevada courts' institutionalization of such prejudice; indeed, the social tragedy represented by this case—courts eschewing their traditional role of protectors *against* prejudice—compounds the devastating personal tragedy the case represents for Suzanne Daly.

Respondent relies upon the widespread ignorance and prejudices concerning gender dysphoria and its treatment—notwithstanding undisputed evidence in the record and a substantial body of literature indisputably establishing the seriousness of that medical condition and the legitimacy of surgical treatment—to defend the Nevada courts' arbitrary interference with commanding, constitutionally protected rights of parenthood. Respondent's attempt to obscure the constitutional ramifications of this case is ineffective. As we now explain in detail, Suzanne Lindley Daly wants no more, and certainly no less, than for this Court to acknowledge her right to be treated like any other parent, and to restore her coveted parental status.

—Legal Discussion—

The Decision of the Nevada Supreme Court To Permanently, Irrevocably And Completely Terminate Petitioner Suzanne Lindley Daly's Status As A Natural Parent Is Not "Based On Independent Grounds Of State Law," As Respondent Argues, But Is An Egregious, Unwarranted Violation Of Federally Protected Rights Afforded A Natural Parent. As Such, This Court Should Grant The Review Requested And Reverse The Decision Of The Nevada Supreme Court.

A. The Issues Presented Here Raise Significant Federal Constitutional Questions Plainly Reviewable By This Court.

In her brief in opposition to the petition, respondent argues that this case "fails to present a substantial federal question for review," and that the decision of the Nevada Supreme Court was "based on independent grounds of state law." Opposition, p. 2. This contention is utter nonsense. Even if this Court had not repeatedly held that parental rights are entitled to the most stringent federal constitutional protections, e.g., *Santosky v. Kramer*, 455 U.S. 745, 760 (1982); *Lassiter v. Department of Social Services*, 452 U.S. 18, 27 (1981); *Stanley v. Illinois*, 405 U.S. 645, 649 (1972), the fundamental nature of the parent-child relationship makes it self-evident that a state court's determination to permanently and irrevocably extinguish that relationship is entitled to the closest constitutional scrutiny. If a state could insulate such determinations from federal constitutional scru-

tiny simply by purporting to base its decision upon "independent state grounds," the Fourteenth Amendment would effectively be excised from the Constitution.

But respondent goes on to argue that, in the area of parental rights, this Court has encouraged "innovation and experimentation without interference by the federal courts." Opposition, p. 4. For this proposition, she relies upon two of this Court's opinions, neither of which is remotely applicable here.

In *Lehman v. Lycoming County Children's Services*, 458 U.S. 502 (1982), this Court held that the statute conferring habeas corpus jurisdiction upon the federal courts could not be construed to permit the federal courts to consider a collateral challenge to a state statute pursuant to which state-intitiated proceedings had terminated the rights of a parent whose children had been in the custody of a state agency for five years. In concluding that the custody of children by a state agency was not the type of custody traditionally challenged by habeas corpus proceedings, this Court simply refused to expand its habeas jurisdiction to permit such a collateral attack. Indeed, far from broadly precluding its review of these important constitutional issues, this Court expressly recognized in *Lehman* that it "has considered constitutional challenges to custody or parental-rights proceedings, but these cases have reached the Court on direct review of the final state-court decision, not on federal habeas." *Id.* at 512, fn. 14. Thus, respondent's reliance on *Lehman* is totally misplaced, as that opinion directly supports Suzanne Daly's right to review of this case by direct attack and in no way supports respondent's attempt to persuade this Court to decline review.

Respondent next misinterprets narrow language from the dissenting opinion in *Santosky v. Kramer*, 455 U.S. 745 (1982). Although the *Santosky* dissenters did protest federal review of that case, two years later those same dissenters apparently reconsidered their position: They participated in this Court's decision to review, on writ of certiorari, and unanimously reverse, a state court judgment "divesting a natural mother of the custody of her infant child...." *Palmore v. Sidoti, supra*, 466 U.S. 429, 430 (1984). Thus the *Santosky* dissenters have recognized that review of family law issues by this Court cannot and should not be avoided where, as here, state court action has destroyed cherished parental rights:

> "The intangible fibers that connect parent and child have infinite variety. They are woven throughout the fabric of our society, providing it with strength, beauty, and flexibility. *It is self-evident that they are sufficiently vital to merit constitutional protection ....*" *Lehr v. Robertson*, 463 U.S. 248, 256 (1983), emphasis supplied.

The Nevada Supreme Court's decision upholding the per - manent termination of Suzanne Daly's fundamental parental rights presents several important federal questions and is plainly reviewable by this Court. Respondent's arguments to the contrary are meritless and represent no barrier to review.

B. *Amicus Curiae's* Argument That Suzanne Daly "Never Brought A Facial Attack" On The Parental Termination Statute, NRS 128.105(4), Before the Nevada Supreme Court Is Unfounded And Utterly Without Merit, As That Issue Was Squarely Presented To The Lower Court.

Amicus curiae the State of Nevada ("State") erroneously contends that this Court should deny Suzanne Daly's petition because she did not raise before the Nevada Supreme Court her facial attack on the parental termination statute, NRS 128.105(4). A glance at Suzanne Daly's opening brief filed in the Nevada Supreme Court—relevant parts of which are attached hereto as an appendix—demonstrates without question that this issue was raised. Appendix, pp. 1-3. In that brief, Suzanne Daly plainly argued for reversal upon the grounds that the Nevada parental termination provisions are vague for three separate reasons recognized by the court in *Alsager v. District Court* , 406 F.Supp. 10, 18-19 (S.D. Iowa 1975), aff'd on other grounds, 545 F.2d 137 (8th Cir. 1976): "(1) lack of warning as to proscribed conduct; (2) overbroad official discretion; and (3) undue inhibition of protected conduct." Appendix to Reply, p. 3.

The State also argues that to properly raise this issue below Suzanne Daly "would have had to serve the Attorney General of the State of Nevada with a copy of the proceeding." Opposition, p. 4. For this proposition, the State cites NRS 30.130. But that statute—which appears in a chapter of the Nevada Revised Statutes entitled "Uniform Declaratory Judgments Act"—requires service on the Attorney General *only* in proceedings in which "declaratory relief is sought," not in parental termination proceedings. Appendix to Opposition, p. 1a. The State fails to quote this portion of the statute in the text of its brief, and it is easy to understand why; the plain language of the statute itself demonstrates its inapplicability in the present case.

Accordingly, the State's argument that Suzanne Daly has not properly preserved the void-for-vagueness challenge of NRS 128.105(4) is patently incorrect.

C. Respondent's Argument That "No Substantial Federal Question Is Presented For Review By This Court," In That Suzanne Daly Is Not A Member Of A Suspect Class And Thus Was Not Denied Equal Protection Under The Law, Is A Straw Man.

The thrust of respondent's final argument is that Suzanne Daly is not a member of a suspect class, and thus the decision to terminate her parental rights is accorded only a "rational basis" standard of review. This argument is absolutely without merit. Suzanne Daly has never claimed that the fact that she suffered from gender dysphoria has made her a member of a suspect class; rather, she contends that it is the denial to her of her fundamental parental rights which invokes a stringent standard of review by this Court.

The issue was addressed and analyzed in *Stanley v. Illinois,* 405 U.S. 645 (1972). Applying the guarantees contained in the Equal Protection Clause, the *Stanley* court strictly reviewed the lower court's judgment terminating parental status, recognizing that:

> "The private interest here, that of a man in the children he has sired and raised, undeniably warrants deference and, absent a powerful countervailing interest, protection. It is plain that the interest of a parent in the companionship, care, custody, and management of his or her children comes to this Court with a momentum for respect lacking when appeal is

made to liberties which derive merely from shifting economic arrangements." *Id.* at 652.

Thus, this Court has expressly instituted a strict standard of review over state court judgments terminating parental rights, while explicitly rejecting the lower level of review afforded purely economic classifications and deprivation of less fundamental rights.

Respondent also contends that the invidiously discrimi - natory treatment rendered Suzanne Daly as a parent solely because of her medical condition is not because of the conditions itself, but "because of its effect on the child."[1] Opposition, pp. 12, 14. A nearly identical argument was rejected by this Court in *Palmore v. Sidoti,* 466 U.S. 429 (1984). That case concerned a state court judgment denying custody of her children to a mother who had married a man of a different race. Like the Nevada courts here, the Florida courts in *Palmore* sought to disguise their prejudices by asserting that they had no choice but to protect the child from what they perceived as a childhood doomed to "suffer(ing) from the social stigmatization that is sure to come from living in a racially mixed household." *Id.* at 431. In that case, as in the case presently before this Court, there can be no disa - greement that "[i]t would ignore reality to suggest that...prejudices do not exist or that all manifestations of...prejudices have been eliminated." *Id.* at 433. Never- theless, this Court explained in *Palmore* that "the reality of private biases and the possible injury they might inflict are [not] permissible consideration for removal of a...child from

[1] Thus respondent appears to concede that the Nevada court terminated Suzanne Daly's rights as a natural parent based solely on its perception of the child's supposed "best interests" without any determination of parental unfitness. Opposition, pp. 2, 3, 7, 12, 14.

the custody of its natural [parent]." *Id.* Accordingly, a unanimous Court proclaimed that "[p]rivate biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect," and reversed the state court judgment.

Suzanne Daly's status is that of a parent who suffered from the medical condition known as gender dysphoria. She realizes that prejudice toward her medical condition continues to blight our culture. That this prejudice exists is plainly evident from the majority opinion of the Nevada Supreme Court, which characterized Suzanne Daly's medical condition as a "choice," Appendix to Petition, p. 9, and is further illustrated by respondent's mischaracterization of Suzanne Daly's medical condition as an act of "selfishness." Opposition, p. 11. A gender dysphoric person neither chooses his or her condition nor acts selfishly in undergoing medically recommended treatment, any more than a person suffering from a herniated disk chooses to have back problems or acts selfishly in undergoing surgery or taking pain medication to relieve that condition. Yet, by constantly characterizing Suzanne Daly's condition as one freely chosen, respondent, the trial court, and three judges of the Nevada Supreme Court propagate and place a patina of legitimacy upon the unfortunate prejudices that underlay this entire proceeding.

Because Suzanne Daly has been denied her fundamental right to be a parent solely because of invidious discrimination, important federal questions are presented for review by this Court. Accordingly, this Court should grant the review requested and correct the unconstitutional termination of Suzanne Daly's parental rights.

—Conclusion—

For all these reasons, the briefs of both respondent and amicus curiae the State of Nevada fail to demonstrate any basis for denial of the relief requested by Suzanne Daly. Indeed, they demonstrate why review is desperately needed in this case—to correct the misunderstanding and prejudice concerning gender dysphoric individuals that afflicts our society and has wrought such tragic consequences for Suzanne Daly and her daughter. Accordingly, Suzanne Daly respectfully requests this Court to grant her Petition for Writ of Certiorari to the Supreme Court of the State of Nevada.

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—APPENDIX—

B. Substantive Due Process

1. NRS Chapter 128 is void for vagueness as applied.

The essential substantive criteria of the trial court's inquiry are suspect. A number of cases have examined the concept of "best interests of the child" in the termination context.

In *Alsager v District Court* (DC Iowa 1975) 406 FSupp 10, a state court termination decision was challenged in a civil rights action. The opinion, affirmed on appeal (545 F2d 1137) noted the following:

a. Parents have fundamental liberty and privacy interests in their relationships with natural children. 406 FSupp at 16;

b. A state may not avoid vagueness by denominating the proceedings "civil". id. at 17;

c. The vague standard of "best interests" fails to give ample warning of proscribed conduct. id. at 17;

d. To sustain the burden of a compelling state interest, the consequences of termination must be found to be less harmful than those of continuation. id. at 23;

e. Notice of the proceedings must be specific factually and legally; a petition paraphrasing statutory language is procedurally unconstitutional. id. at 24.

Reference to the trial court's short decision (CI 50-53) shows the same lack of specificity that brought federal restraint in *Alsager*. Nowhere are the findings supported by evidence:

> "Due to circumstances brought about by her own actions a conduct, [petitioner], to date of the hearing, had been unable for whatever reason to put her life in a

> condition where it would be in the 'best interests' of Mary to have parental rights as to her." (CI 50:25-29)

What "circumstances"? What "actions and conduct"? What "reason"? What "condition"? What are Mary's "best interests"?

> "If the natural father is not capable for whatever reason to be a father for the child within the minimal acceptable standards, he is to be deemed unfit, unstable, or unqualified to have reasonable visitation rights as deemed not in the best interests of the child or for the child's welfare." (CI 51:19-24)

What "reason"? What standards are "minimal[ly] ac - ceptable"? What is the evidence of instability? How does one "qualify" for parental rights?

> "It appears to this court that the situation her is not re - solvable without hurting Mary deeply." (CI 52:20-21)

Where is the elimination of the counseling alternative—which has yet to be attempted—as a potential source of resolution?

Alsager listed three dangers of vague statutes: (1) lack of warning as to proscribed conduct; (2) overbroad official discretion; (3) undue inhibition of protected conduct. 406 FSupp at 18. The cure for vagueness is definitive narrowing construction by state courts. *Grayned v City of Rockford* (1972) 408 US 104. This court should construe the "best interests of the child" standard as permitting termination only as a prerogative of the state upon a threshold showing of serious and unmitigable objective harm to the

child. If that is done, this case must be reversed, remanded, and dismissed. Then, if Respondent wishes to pursue some protective limitation of [petitioner's] visitation rights, she can do so in modification of the existing custody decree. Such a construction would find accord with the limitations expressed by other high courts:

People in the Interest of C.S. (Colo 1980) 613 P2d 1304: Best interests of the child requires (1) a history of severe and continuous neglect by the parent sought to be terminated; (2) a substantial probability of specific future harm; (3) that continuation of the relationship can under no reasonable circumstances benefit the child;

Matter of Swartzfager (Ore 1981) 290 Or 799, 626 P2d 882: Courts should hesitate to terminate parental rights for "alienation" of parent-child relationship, regardless of whether parental conduct caused such alienation;

In Re Castillo (Utah 1981) 632 P2d 855: "... a child is not a mere pawn of the state to be dealt with solely on the basis of what public officials, or even the courts, may believe is in the child's best interests ..." and "when it plainly appears that there is such ... deficiency ... in the parent-child relationship that the values inherent therein are almost entirely absent, the law recognized the need and provides the means for the termination of parental rights."

Matter of Doe (New Mexico 1982) 98 NM 198, 647 P2d 400: The court may not balance the backgrounds of the parties and decide which party may provide the "better" environment in termination actions.

Respondent and the trial court have applied the relative considerations of custody cases to the drastic and irrevocable decision to terminate fundamental rights. This court must define "best interests of the child" narrowly. Construed as a remedy of last resort, termination is clearly misapplied here.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEVADA

BRIEF OF AMICUS CURIAE STATE OF NEVADA IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. May the petitioner challenge the constitutionality of a statute on its face for the first time in this Court?

2. Is Nevada Revised Statute 128.105 (4) sufficiently definite to be held constitutional?

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STATEMENT OF THE CASE

The petitioner asks for a writ of certiorari to review proceedings in the Nevada State Supreme Court in which termination of her parental rights was affirmed on the ground that return of her child to her would result in serious emotional injury to the child. The basis for this holding was that serious emotional injury had already occurred to the child as a result of her father's (the petitioner) sex reassignment operation and the reaction of the child to such a change of sex and because the child felt she had lost her father, that is, he was dead.

The petitioner challenges the facial constitutionality of NRS 128.105(4) for the first time in this court. In the Nevada Supreme Court she challenged the whole termination of parental rights

Had the petitioner in this proceeding attacked any part of NRS Chapter 128 as facially invalid, she would have had to serve the Attorney General of the State of Nevada with a copy of the proceeding. The Attorney General would have been entitled to be heard because petitioner would have been seeking to have the statute declared unconstitutional on its face. See NRS 30.130, which reads in relevant part:

> . . . In any proceeding [where a] statute, . . . is alleged to be unconstitutional, the attorney general shall also be served with a copy of the proceeding and be entitled to be heard.

In that event, the Attorney General of the State of Nevada would have had an opportunity to fully brief the question of the validity vel non of Chapter 128 of the Nevada Revised Statutes, or any portion thereof, under facial attack for vagueness in the Nevada courts.

The petitioner in this proceeding should not now be permitted to raise for

the first time an attack on the facial validity of NRS 128.105(4).

In Street v. New York, 394 U.S. 576 (1969), the Court said at pages 581, 582:

> The New York Court of Appeals did not mention in its opinion the constitutionality of the "words" part of §1425, subd. 16, par. 4. Hence, in order to vindicate our jurisdiction to deal with this particular issue, we must inquire whether that question was presented to the New York courts in such a manner that it was necessarily decided by the New York Court of Appeals when it affirmed appellant's conviction. If the question was not so presented, then we have no power to consider it. See 28 U.S.C. §§1257 (2), 1257(3); Bailey v. Anderson, 326 U.S. 203, 206-207, 66 S.Ct. 66, 68, 90 L.Ed. 3 (1945). Moreover, this Court has stated that when, as here, the highest state court has failed to pass upon a federal question, it will be assumed that the omission was due to want of proper presentation in the state courts, unless the aggrieved party in this Court can affirmatively show the contrary. [Citations omitted.]

Suzanne Daly failed to raise the question of the validity on its face of

NRS 128.105(4) in the courts of Nevada. What she did do was mount an attack in the Nevada Supreme Court on the constitutionality of NRS Chapter 128 as applied to her. That is an insufficient basis for challenging the facial validity of NRS 128.105(4) in this Court. The Nevada courts have not had an opportunity to review the question of the facial validity of the statute. It is therefore respectfully submitted that this Court should deny certiorari to review this question.

II

NRS 128.105(4)
IS PRESUMPTIVELY VALID

In Davies Warehouse Co. v. Bowles, 321 U.S. 144, 153 (1944), the Court held: ". . . State statutes, like federal ones, are entitled to the presumption of constitutionality until their invalidity is judicially declared. . . ."

In U.S. v. Carolene Prods. Co., 304

U.S. 144 (1938), the Court stated that in a similar case involving a claim of unconstitutionality under the Fourteenth Amendment the Court had upheld the State statute. The Court then said at page 148:

> We see no persuasive reason for departing from that rule here, where the Fifth Amendment is concerned; and since none is suggested, we might rest decision wholly on the presumption of constitutionality.

See also Childs v. Childs, 419 N.Y.S.2d 533, 540 (1979), cert. den. and app. dismissed, 446 U.S. 901 (1980), where the court said:

> [A]n appellate court has an obligation to pursue every reasonable path of reconciliation of the challenged statute consistent with the Constitution rather than setting it aside. In this regard, it is commonly said that every presumption in favor of the statute will be indulged, every effort made to construe ambiguous language so as not to conflict with fundamental law. [Citations omitted.] . . . [U]nder appropriate circumstances, a court may read a statute expansively, or in tandem with other statutes, so as to prevent serious damage to overriding public

policy [Citations omitted]. . . .

NRS 128.105(4) is entitled to a strong presumption of constitutionality unless petitioner affirmatively shows that it is invalid.

III

NRS 128.105(4) IS
NOT UNCONSTITUTIONALLY VAGUE

The statute in the case at bar is designed for the protection of children and is as definite as it is possible to make a statute dealing with termination of parental rights to prevent serious harm to children from the conduct of their parent or parents. In U.S. v. Petrillo, 332 U.S. 1, 7 (1946), this Court held:

> . . . The Constitution has erected procedural safeguards to protect against conviction for crime except for violation of laws which have clearly defined conduct thereafter to be punished; the Constitution does not require impossible standards. The language here challenged conveys sufficiently definite warning as to the proscribed conduct when measured

> by common understanding and practices. The Constitution requires no more.

Kolender v. Lawson, 461 U.S. 352, 357, 358 (1983), quoted from by petitioner, does not change the rule stated in Petrillo, supra, for there the court cited to Petrillo with approval. Moreover, the statute challenged in Kolender was a loitering statute, historically subject to successful challenge as void for vagueness. The Court pointed out that its concern was based upon the potential for arbitrarily suppressing First Amendment freedoms and that in addition the loitering statute under attack in that case implicated consideration of the constitutional right to freedom of movement. p. 358. Neither factor is a consideration in the case now sought to be reviewed by the Supreme Court.

A case more on point to the instant situation is People v. D. A. K., 198 Col.

11, 596 P.2d 747, appeal dismissed 444 U.S. 987 (1979). This was a case in which a mother whose child was declared neglected and dependent challenged the statute which provided that "[a] neglected or dependent child is one whose parent has subjected him or her to 'mistreatment or abuse.'" p. 750. The court construed the statute to include both physical and emotional abuse. The court said at page 751:

> While acknowledging that the possible consequences of adjudicating a child to be neglected or dependent can be grave, we hold that the statute gives the parents sufficient notice of the kinds of conduct which could result in their losing their parental rights. An ordinarily reasonable parent can understand what it means to "abuse" and "mistreat" a child. Fundamental fairness does not require a statute to enumerate in all encompassing examples, or exactly described acts, precisely how poorly a parent can treat a child before risking loss of parental rights. [Citation omitted.] . . .

> Furthermore, the statute is as explicit as could be in order to accomplish the purposes intended [the protection of children]. U.S. v. Petrillo, 332 U.S. 1, 67 S.Ct. 1538, 91 L.Ed. 1877 (1946). The protection of an abused or mistreated child is an area of legitimate legislative concern which does not lend itself to more precise definition. A legislature would find it extremely difficult, if not impossible, to write a statute more specific to accomplish the purposes of protecting the child's safety and welfare while still allowing the juvenile court reasonable flexibility in determining the best interests of the child and society in each case.

This Court has expressed the same philosophy in Smith v. Goguen, 415 U.S. 566 (1974): "There are areas of human conduct where, by the nature of the problems presented, legislatures simply cannot establish standards with great precision. . . ." See also Arnett v. Kennedy, 416 U.S. 134 (1974), reh. den. 417 U.S. 977 (1974). The protection of children from seriously injurious conduct by their

parents is one such area, and NRS 128.105 (4) is a statute dealing with such an area. An ordinarily reasonable parent can determine what actions are sufficient to present a risk of serious emotional or mental injury, as set forth in NRS 128.105 (4). NRS 128.105(4) provides:

> An order of the court for termination of parental rights may be made on the grounds that the termination is in the child's best interest in light of the considerations set forth in this section and NRS 128.106, 128.107 and 128.108:
>
> . . .
>
> 4. Risk of serious physical, mental or emotional injury to the child if he were returned to, or remains in the home of, his parent or parents;

It is clear from this language that if a parent creates a situation which would result in serious physical, mental or emotional injury to the child if he were returned to the home of his parent, as established by the evidence presented at trial, the parental rights of the parent

may be terminated.

NRS 128.105(4) may not be read in a vacuum. Nevada Revised Statutes Chapter 128 must be considered in its entirety. The definition of injury in NRS 128.013 and mental injury in NRS 128.0137 provide a standard which requires proof of the injuries mentioned in NRS 128.105(4). NRS 128.0137 defines mental injury as "an injury to the intellectual or psychological capacity of a child as evidenced by an observable and substantial impairment in his ability to function within his normal range of performance and behavior."

Proof of injury or risk of serious injury would have to be established by clear and convincing evidence before a termination of parental rights could be granted. See NRS 128.090(2); Santosky v. Kramer, 455 U.S. 745 (1982); and Cloninger v. Russell, 98 Nev. 597, 598, 655 P.2d 528 (1982).

In addition, under NRS 128.105 specific considerations obtaining in other sections of the chapter are to be considered. For instance, NRS 128.106(2) provides that the court may consider conduct toward a child of an emotionally cruel or abusive nature. Under NRS 128.107(2) the court may consider the physical, mental or emotional condition and needs of the child and his desires regarding the termination, if the court determines he is of sufficient capacity to express his desires. It is therefore clear that there are standards set forth for the application of NRS 128.105(4) and it is not vague.

In Roth v. U.S., 354 U.S. 476 (1957), the appellants argued that certain obscenity statutes did not provide reasonably ascertainable standards of guilt and therefore violated the constitutional requirements of due process. The court

said at page 491:

> Many decisions have recognized that these terms of obscenity statutes are not precise. The Court, however, has consistently held that lack of precision is not itself offensive to the requirements of due process. ". . .[T]he Constitution does not require impossible standards"; all that is required is that the language "conveys sufficiently definite warning as to the proscribed conduct when measured by common understanding and practices. . . ." U.S. v. Petrillo, 332 U.S. 1, 7-8. . . .

The Court went on at page 491 to say:

> . . . That there may be marginal cases in which it is difficult to determine the side of the line on which a particular fact situation falls is no sufficient reason to hold the language too ambiguous to define a criminal offense." Id. at 7. [Citations omitted.]

At most, the instant case is a marginal case based on the facts presented. NRS 128.105(4) is itself clearly sufficiently definite to be held constitutional on its face. Therefore, the Petition for Writ of Certiorari should

be denied.

CONCLUSION

It is respectfully submitted by the State of Nevada that the Petition for Writ of Certiorari should be denied. The petitioner failed to challenge the validity of NRS 128.105(4) in the Nevada Supreme Court and thus has failed to exhaust a potential State remedy and has waived the argument. Additionally, the statute in question establishes sufficient warning of the conduct that may result in termination of parental rights that an ordinary person exercising ordinary common sense can understand what is

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expected. The statute is not unconstitutionally vague and certiorari should not issue.

DATED: August 5, 1986

Respectfully submitted,

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APPENDIX

NRS 30.130 Parties. When declaratory relief is sought, all persons shall be made parties who have or claim any interest which would be affected by the declaration, and no declaration shall prejudice the rights of persons not parties to the proceeding. In any proceeding which involves the validity of a municipal ordinance or franchise, such municipality shall be made a party, and shall be entitled to be heard, and if the statute, ordinance or franchise is alleged to be unconstitutional, the attorney general shall also be served with a copy of the proceeding and be entitled to be heard.

[11:22:1929; NCL §9450]

NRS 128.013 "Injury" defined.

1. "Injury" to a child's health or welfare occurs when the parent, guardian or custodian:

(a) Inflicts or allows to be inflicted upon the child, physical, mental or emotional injury, including injuries sustained as a result of excessive corporal punishment;

(b) Commits or allows to be committed against the child, sexual abuse as defined in NRS 432B.100;

(c) Neglects or refuses to provide for the child proper or necessary subsistence, education or medical or surgical care, although he is financially able to do so or has been offered financial or other reasonable means to do so; or

(d) Fails, by specific acts or omissions, to provide the child with ade-

quate care, supervision or guardianship under circumstances requiring the intervention of the welfare division of the department of human resources or a county agency authorized by the juvenile court to receive and investigate reports of abuse or neglect of a child pursuant to NRS 432B.300, or of the court itself.

2. A child's health or welfare is not considered injured solely because his parent or guardian, in the practice of his religious beliefs, selects and depends upon nonmedical remedial treatment for the child, if such treatment is recognized and permitted under the laws of this state.

(Added to NRS by 1981, 1750; A 1985, 1397)

NRS 128.0137 "Mental injury" defined. "Mental injury" means an injury to the intellectual or psychological capacity of a child as evidenced by an observable and substantial impairment in his ability to function within his normal range of performance and behavior.

(Added to NRS by 1981, 1751)

NRS 128.090 Hearing; evidence; postponement.

1. At the time stated in the notice, or at the earliest time thereafter to which the hearing may be postponed, the court shall proceed to hear the petition.

2. The proceedings are civil in nature and are governed by the Nevada Rules of Civil Procedure. The court shall in all cases require the petitioner to establish the facts by clear and convincing evidence and shall give full

and careful consideration to all of the evidence presented, with regard to the rights and claims of the parent of the child and to any and all ties of blood or affection, but with a dominant purpose of serving the best interests of the child.

3. Information contained in a report filed pursuant to NRS 432.100 to 432.130, inclusive, or chapter 432B of NRS may not be excluded from the proceeding by the invoking of any privilege.

4. In the event of postponement, all persons served, who are not present or represented in court at the time of the postponement, must be notified thereof in the manner provided by the Nevada Rules of Civil Procedure.

[9:161:1953]--(NRS A 1969, 95; 1981, 1754; 1985, 128, 1398)

NRS 128.105 Grounds for terminating parental rights: Basic considerations. An order of the court for termination of parental rights may be made on the grounds that the termination is in the child's best interest in light of the considerations set forth in this section and NRS 128.106, 128.107 and 128.-108:

1. Abandonment of the child;

2. Neglect of the child;

3. Unfitness of the parent;

4. Risk of serious physical, mental or emotional injury to the child if he were returned to, or remains in, the home of his parent or parents;

5. Only token efforts by the parent or parents:

(a) To support or communicate with the child;

(b) To prevent neglect of the child;

(c) To avoid being an unfit parent; or

(d) To eliminate the risk of serious physical, mental or emotional injury to the child; or

6. With respect to termination of the parental rights of one parent, the abandonment by that parent.

(Added to NRS by 1975, 964; A 1981, 1755; 1985, 244)

NRS 128.106 Specific considerations in determining neglect by or unfitness of parent. In determining neglect by or unfitness of a parent, the court shall consider, without limitation, the following conditions which may diminish suitability as a parent:

1. Emotional illness, mental illness or mental deficiency of the parent which renders the parent consistently unable

to care for the immediate and continuing physical or psychological needs of the child for extended periods of time.

2. Conduct toward a child of a physically, emotionally or sexually cruel or abusive nature.

3. Excessive use of intoxicating liquors, controlled substances or dangerous drugs which renders the parent consistently unable to care for the child.

4. Repeated or continuous failure by the parent or parents, although physically and financially able, to provide the child with adequate food, clothing, shelter, education or other care and control necessary for his physical, mental and emotional health and development, but a person who, legitimately practicing his religious beliefs, does not provide specified medical treatment

for a child is not for that reason alone a negligent parent.

5. Conviction of the parent or parents for commission of a felony, if the facts of the crime are of such a nature as to indicate the unfitness of the parent or parents to provide adequate care and control to the extent necessary for the child's physical, mental or emotional health and development.

6. Unexplained injury or death of a sibling of the child.

7. Inability of appropriate public or private agencies to reunite the family despite reasonable efforts on the part of the agencies. (Added to NRS by 1981, 1751)

NRS 128.107 Specific considerations where child is not in physical custody of parent. If a child is not in the physical custody of the parent or parents,

the court in determining whether parental rights should be terminated, shall consider, without limitation:

1. The services provided or offered to the parent or parents to facilitate a reunion with the child.

2. The physical, mental or emotional condition and needs of the child and his desires regarding the termination, if the court determines he is of sufficient capacity to express his desires.

3. The effort the parent or parents have made to adjust their circumstances, conduct or conditions to make it in the child's best interest to return him to his home after a reasonable length of time, including but not limited to:

(a) The payment of a reasonable portion of substitute physical care and maintenance, if financially able;

(b) The maintenance of regular visita-

tion or other contact with the child which was designed and carried out in a plan to reunite the child with the parent or parents; and

(c) The maintenance of regular contact and communication with the custodian of the child.

4. Whether additional services would be likely to bring about lasting parental adjustment enabling a return of the child to the parent or parents within a predictable period of time.

For purposes of this section, the court shall disregard incidental contributions, contacts and communications.

(Added to NRS by 1981, 1751)

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No. 86-3

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Supreme Court of the United States
October Term, 1986

SUZANNE LINDLEY DALY,
Petitioner,

vs.

NAN TOEWS DALY,
Respondent.

MOTION OF WOMEN LAWYERS' ASSOCIATION OF LOS ANGELES FOR LEAVE TO FILE BRIEF AMICUS CURIAE IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI; BRIEF AMICUS CURIAE

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Women Lawyers' Association of Los Angeles respectfully moves this Court for leave to file the accompanying brief in this case as *amicus curiae*. The consent of the attorneys for petitioner has been obtained, but the attorney for respondent refused to consent to the filing of this brief.

Applicant has an interest in this case because it is an organization whose members are female and male lawyers, judges and law students, many of whom are or expect to become parents. As lawyers, applicant's members also represent clients whose parental rights may be unfairly or arbitrarily terminated by reason of their membership in a disfavored minority group. Applicant and its members are concerned with the importance of preserving the fundamental right of parenthood from arbitrary and discriminatory termination.

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The attached brief is filed in support of the petition for a writ of certiorari. Applicant believes that the issues of due process and equal protection raised by this case are not adequately addressed by the petition. If applicant's arguments are approved by this Court, the Court should grant certiorari in this case.

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—INTEREST OF AMICUS CURIAE—

Amicus curiae is a local bar association whose members are female and male lawyers, judges and law students concerned with promoting the legal and social rights of women. Many of the members of *amicus* are or anticipate becoming parents. As lawyers, it members also represent female and male clients whose parental rights may be unfairly or arbitrarily terminated by reason of their membership in a disfavored minority group. *Amicus* and its members are personally and professionally concerned with the importance of preserving the fundamental right of parenthood from arbitrary or discriminatory termination. *Amicus* therefore submits this brief in support of the petition for writ of certiorari.

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—INTRODUCTION—

Petitioner Suzanne Lindley Daly is the natural parent of Mary Toews Daly. Suzanne's parental rights were totally and permanently terminated because she underwent sexual reassignment surgery and therapy. Such treatment is medi - cally approved and is the only successful treatment for the condition known as "gender dysphoria."

The opinions and findings of fact and conclusions of law attached as an appendix to the petition reveal that Suzanne was never found to be an unfit parent. Rather, her parental rights were terminated because the trial court felt the parent-child relationship was emotionally difficult for Mary and that such termination was therefore in the best interest of the child.

Termination proceedings were initiated by an admittedly vindictive former spouse. The State of Nevada was never involved in the proceedings, although as parens patriae it has a strong interest in maintaining and fostering the parent-child relationship. As a result of the decree, Mary is now totally dependent upon respondent for support; the child has no right to inherit from Suzanne or to bring an action for wrongful death, and the state has no right to look to Suzanne for child support in the event respondent dies or becomes unable to support Mary. Similarly, Suzanne's rights to communicate with and to support her only child, as well as other rights inherent in the parent-child relationship, have been totally and permanently severed.

—SUMMARY OF ARGUMENT—

The decision of the Supreme Court of the State of Nevada, affirming the permanent termination of petitioner's parental rights on the ground of the perceived "best interest of

the child," without a finding that petitioner is unfit, violates the equal protection and due process clauses of the Constitution.

Petitioner's parental rights were terminated without the unfitness finding mandated by this Court in *Stanley v. Illinois*, 405 U.S. 645, 649 (1972). The trial court record reveals that the hearing which preceded the termination of petitioner's parental rights did not focus on her fitness or unfitness as a parent; rather, the trial judge permitted a great deal of inflammatory and prejudicial—but irrelevant—testimony and argument concerning such side issues as whether petitioner's expert witness was a "pervert" and whether the child would consort with "perverts" if petitioner were allowed to retain her parental rights.

The trial was conducted in an atmosphere of hysteria, depriving the trial of the fairness and decorum to which petitioner was entitled. In fact, the state court opinions attached to the petition confirm that the true ground for terminating petitioner's parental rights is that she is a former transsexual, having undergone the medically approved and perfectly legal procedure of sexual reassignment surgery.

Petitioner's rights to due process have thus been violated, in that she has been deprived of her fundamental right of parenthood without a fair hearing and a finding that she is an unfit parent, and because of her status, rather than for any unlawful conduct. Furthermore, the lower courts acted in excess of their jurisdiction in terminating petitioner's parental rights without a finding of unfitness. Petitioner's right to equal protection of the laws has also been violated, in that parents who are not classified as transsexual are not deprived of their parental rights unless they are found to be unfit.

—ARGUMENT—

A. The State of Nevada Violated Petitioner's Right To Due Process Of Law By Permanently Depriving Her Of Her Fundamental Rights As A Natural Parent In A Trial Infected By Appeal To Inflammatory Passion And Prejudice

It has long been the rule of law that persistent appeals to prejudice and passion have no place in the American courtroom. *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 239-40 (1940); *New York Central R. Co. v. Johnson*, 279 U.S. 310, 319 (1929). Indeed, such appeals are improper and where a verdict results from appeals to passion, prejudice or caprice, the court must order a new trial, whether the proceeding be civil or criminal. *Minneapolis, St.P & S.S.M. Ry. Co. v. Moquin*, 283 U.S. 520 (1931); *United States v. Berger*, 295 U.S. 78, 85 (1935); *Gibbs v. United Mine Workers of America*, 343 F.2d 609, 616 (6th Cir. 1965).

Respondent herein adopted a trial strategy that can only be characterized as a persistent appeal to prejudice against transsexual stereotypes which placed petitioner at a "severe disadvantage" before the trial court . *United States v. Turoff*, 291 F.2d 864, 866-68 (2d Cir. 1961) (conviction reversed in face of overwhelming evidence of guilt where prosecutor elicited evidence of defendant's past association with the Communist party). A brief review of the most inflammatory remarks leads to but one conclusion: that Suzanne Daly lost her fundamental right to be Mary Daly's parent in a pro - ceeding so infected with innuendo and sensationalism unsup - ported by facts in the record and lacking in dispassionate

in dispassionate analysis that to call it a fair trial does a grave disservice to the time-honored precept of due process of law.

Although the trial commenced in a relatively civilized manner, it quickly degenerated when the court permitted respondent, over petitioner's objection, to offer what amounted to expert testimony that Mary Daly would be at risk of contracting AIDS if she were permitted to visit Suzanne Daly. This testimony was premised on respondent's unsupported belief that Suzanne Daly associates regularly with homosexuals as a result of her gender dysphoria and attendance at counseling sessions. II ROA 40-44.

That such uninformed testimony was permitted did not bode well for Suzanne Daly's right to a fair trial.

Respondent's counsel next cross-examined Lin Fraser, a psychotherapist at the counseling center Suzanne Daly attended on a regular basis. Despite a complete absence of competent evidence establishing that Mary Daly did not want to see her father, counsel pursued a line of questioning, over petitioner's objection, premised on that "fact." II ROA 154-157. From this point on, the trial became nothing more than a referendum on homosexuality, an issue that was completely irrelevant to the gender dysphoria afflicting Suzanne Daly. Lin Fraser was subjected to a barrage of questions based on the premise that Mary would be surrounded by homosexuals, transvestites and lesbians if Suzanne Daly's parental rights were not terminated. II ROA 163-167 (Q: "Homosexuals and transsexuals and all the perverts are more accepted in San Francisco than they are in a small town like Reno, is it not?").

The next witness was Andrea Cannaan, a social worker at Suzanne Daly's counseling center. After testifying that she had observed Suzanne and her daughter on occasion and that they seemed to have a good relationship, respon - dent's counsel commenced her cross-examination, over objection, by immediately delving into the personal sexual history and relationships of the witness. Counsel had the audacity (and the court's apparent sanction) to ask the witness whether she had ever slept with Suzanne Daly and to suggest several times that the witness really wanted to start a lesbian relationship with Suzanne Daly. II ROA 176-186. In the course of the questioning, respondent's counsel remarked on the race of the witness (black) and the birth of her daughter (out of wedlock). This attempted "moral impeachment" was permitted even though it was plainly irrelevant to Ms. Cannaan's testimony and served only to focus the court on obviously inflammatory topics.

Respondent's blatant appeal to homophobic prejudices again reared its ugly head when Suzanne Daly took the stand. On cross-examination, respondent's counsel queried petitioner about her "admitted Lesbian" friends. II ROA 316. Question: "It wouldn't bother you a bit if Mary became a lesbian, would it?" II ROA 324. Question: "And you don't mind if she would associate with homosexuals?" II ROA 325. Question: "Now you want to guide her to accept your lifestyle with lesbians and transsexuals and homosexuals? You want to give her that direction and you think that is just okay?" II ROA 332-33. Question: "If you did care about her, you'd discontinue your lifestyle, and live the way you lived before and that was as a man." II ROA 360. Question: "You're only thinking of yourself, isn't that true?" II ROA 360.

The closing argument was essentially a diatribe premised again—without support in the record—on the "fact" that Suzanne Daly lived in a world populated only by lesbians, homosexual and other "perverts." A sampling of the argument reveals its flavor:

> "[Mary] relates well to people, to her teachers, to her peers, to her friends. Shall we keep her that way or shall we take a risk and put her in an environment of Lesbians, Gays, Homosexuals, Transsexuals, and Perverts?
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> "Webster defines Perverts as any person who prefers any sexual acts and practices considered to be abnormal.
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> "Abnormal is defined as not normal or typical, and irregular.
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> "Normal is conforming to an accepted standard, naturally, and usual.
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> "Suzanne Daly is a Transsexual. She is not normal. While she says she has Lesbian friends, she says she loves Lesbians. She loves Gays. She loves Transsexuals. And her Lesbian friend says that their personal relationship is quite wonderful and they laugh and have a lot of fun. She wants us to believe that this is normal.
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> "I say that Suzanne Daly is not normal and isn't con - sidering her daughter's needs and is thinking only of her own heeds and her own desires... I say that Suzanne Daly has a disturbed sense of values." III ROA 4.
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> "This is poor judgment to say, Mary, you are going to go to the doctor, Mary, so that you can accept a life style adapted to lesbianism, Transsexuals, Homosexuals, and Perverts, so that you can be accepting this in your own mind." III ROA 7.
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> "I am not a bigot... Let them do whatever they want to do. I couldn't care less; but don't drag this nine year old child in that horrible life style.

> "Surely they are human beings. I respect that. I have known many people who are blacks. I love blacks. I have a black housekeeper, who is in my house, who takes care of my house and me. And she cooks my dinners. We are as close as we can be. And, yet, I am not a hateful person, nor do I hate blacks.
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> "I wanted to make a record that this lady Lesbian that came in here and tried to prove that it would be all right for Mary to come in the house where a Lesbian is; I just don't buy it. I am not a bigot, but I just don't associate myself with it.... We are the ones who are Perverts because we don't think the way they think." III ROA 30.

It is difficult to believe that such a passionate and persistent appeal to prejudice, stereotypes, and ignorance could occur in a courtroom in 1983. Yet this trial is a tragic reminder that unpopular, misunderstood, or shunned minority groups in our society oftentimes can rely only on the Due Process Clause as their sole recourse from private biases and unfair treatment. Suzanne Daly did not receive a fair adjudication of her right to remain Mary Daly's parent. Instead, she was a victim of a proceeding overwhelmed by invidiously bigoted speeches on the dangers of homosexuality and other "perversions" and inappropriate questioning of her witnesses. This was not a dispassionate search for truth but a call to judgment on issues unrelated to Suzanne Daly's fitness to be a parent.

This Court has recognized that the "Constitution cannot control [private] prejudices but neither can it tolerate them." *Palmore v. Sidoti*, 466 U.S. 429, 435 (1984). The unfairness of the trial below based on the inflammatory atmosphere generated by respondent and her counsel compel this Court to grant Suzanne Daly a new trial where her fundamental and precious right of parenthood can be addressed with the solemnity and respect it deserves.

B. Depriving Petitioner, A Former Transsexual, Of Her Parental Rights Without A Finding Of Unfitness Violates The Equal Protection Clause Of The Fourteenth Amendment

The integrity of the family and the right to be a parent have long been recognized as protected by the Equal Protection Clause of the Fourteenth Amendment. *Palmore v. Sidoti*, 466 U.S. 429, 434 (1984) ; *Stanley v. Illinois*, 405 U.S. 645, 651 (1972) ; *Skinner v. Oklahoma* , 316 U.S. 535, 541 (1942). This Court held in *Stanley v. Illinois, supra*, and recently reaffirmed in *Santosky v. Kramer*, 455 U.S. 745, 760 (1982), that due process prohibits terminating the fundamental right of parenthood unless the parent is found to be actually unfit, and that a presumption that a particular class of persons is unfit to be parents is unconstitutional.

Recent decisions of this Court involving the discriminatory deprivation of fundamental parental rights have dispensed with the traditional "suspect classification" analysis often used in equal protection cases. Thus, in *Stanley v. Illinois, supra*, an unwed father's status was held to have been unconstitutionally and discriminatorily singled out. The Court found that while Illinois had a legitimate goal of protecting the interests of the child and of the community and to strengthen family ties, 405 U.S. at 653, the state "spites its own articulated goals" when it needlessly separates a parent from his children on the basis of a legislative presumption that an unmarried father is an unfit parent, without reference to individual circumstances. 405 U.S. at 653-655. Without declaring unwed fathers to be a "suspect class" entitled to special protection, the Court held that the state could not

deprive a parent of fundamental rights on the sole ground of the parent's status as an unmarried father.

Similarly, in the present case petitioner was singled out for termination of parental rights because of her status as a former transsexual. There was no evidence that transsexuals as a class are unfit to be parents; on the contrary, the evidence was that there are good and bad transsexual parents, just as there are good and bad parents who are not transsexuals. Nevertheless, Suzanne Daly's parental rights were terminated without the trial court ever finding that Suzanne Daly as an individual was an unfit parent. This result directly violated the requirements of *Stanley*.

Other cases since *Stanley* have also assumed that the fundamental right of parenthood is not dependent upon special protections afforded to "suspect classes." In *Lassiter v. Department of Social Services*, 452 U.S. 18 (1981), the Court assumed that a parent sentenced to a long prison term was entitled to a fair hearing as to her unfitness, and the only issue was whether she was entitled to appointed counsel in such a proceeding; the parent's status as a convicted felon was not even mentioned as having a bearing on her right to the finding mandated by *Stanley*.

Finally, in the more recent case of *Palmore v. Sidoti*, *supra*, 466 U.S. 429 (1984), the Court held that a parent's custodial rights could not be terminated solely because of her racially mixed marriage, absent a finding that she was an unfit parent. 466 U.S. at 432. The *Palmore* opinion did not base its analysis on the fact that race is well established as a suspect classification subject to strict scrutiny. Rather, it condemned the trial court's surrender to racial prejudice in lieu of the constitutionally required inquiry into the fitness of the individual.

The prejudice against interrracial marriage which this Court disapproved in the *Palmore* opinion quotes the relevant parts of the lower court's opinion:

> "The wife has chosen for herself and for her child, a life-style unacceptable to the father and to society.... The child...is, or at school age will be, subject to environmental pressures not of choice.... The father's evident resentment of the mother's choice of a black partner is not sufficient to wrest custody from the mother. It is of some significance, however, that the mother did see fit to bring a man into her home and carry on a sexual relationship with him without being married to him. Such action tended to place gratification of her own desires ahead of her concern for the child's future welfare. This Court feels that despite the strides that have been made in bettering relations between the races in this country, it is inevitable that Melanie will, if allowed to remain in her present situation and attains school age and thus more vulnerable to peer pressures, suffer from the social stigmatization that is sure to come." 466 U.S. at 431.

This court noted that the *Palmore* trial court had rejected any claim that the mother was unfit and candidly placed its holding on the sole ground of race. 466 U.S. at 432.

The same kinds of bias which underly the *Palmore* trial court's attitudes toward interracial marriage and nonmarital sexual relationships can be recognized in the trial court's attitudes in this case. The trial court's findings included the following remarks:

"One of the important single factors to be considered is the moral character and emotional stability of the [petitioner] Suzanne Lindley Daly, since she would create the moral environment the child would be in if Mary were in her physical custody during any exercise of visitation rights....

"The record and testimony fairly reflects that there is a risk if the child were accorded parental rights, visitation, etc. She has a risk to be put in an environment of persons who prefer sexual minorities which are not normal or typical or are irregular and not generally accepted by society. The court finds that Mary is under emotional distress over this situation at this time.

"The Court is of the opinion that [Suzanne] is a selfish person to [her] own needs, [her] own desires, [her] own wishes, and is not thinking in a realistic way about Mary.

"[Petitioner] Suzanne wants this 9 year old daughter to accept her life style in her life, regardless of what could be a very serious thing to a little girl. Suzanne made her choice. It does show disregard for this child's well being and this child's welfare. The indications are that [petitioner] Suzanne has some very serious emotional problems. Mary doesn't need exposure to a person who has what Dr. Pauly calls a 'gender identity' problem or who is undergoing psychotherapy treatment for the same, which is dramatic and emotional." Petitioner's Appendix 32-34.

Like the *Palmore* trial court, the trial court in this case candidly based its termination decree on its prejudice against transsexuals. It did not find Suzanne to be unfit, but, like the *Palmore* trial court, it assumed that exposure to "sexual minorities" which are not generally accepted socially or are "not normal or typical" would be detrimental to the child. Again like the *Palmore* trial court, it found Suzanne to be "selfish" because she obtained treatment for her medically-diagnosed gender dysphoria, contrary to what the court felt

was the child's emotional well-being and need for social acceptance.

In *Lehr v. Robertson*, 463 U.S. 248 (1983), this Court expressly recognized that parental rights may not be terminated "based solely on differences that are irrelevant to a legitimate governmental objective." 463 U.S. at 265. Suzanne's successful sexual reassignment is such a difference. While it undoubtedly raises many difficult emotional issues for all concerned, the trial court did not find it made Suzanne unfit to be a parent. There was no showing that her status prevents her from providing moral and intellectual guidance to her child, financial support or companionship if the child and her mother were willing to permit such contributions.

The present case is significant not only for the unfair and discriminatory effects on the parties, but also for its potential as dangerous precedent. If the decision of the Supreme Court of Nevada is allowed to stand, it would justify excepting many other disfavored statuses from the protection of *Stanley v. Illinois* . For example, depending on their particular prejudices, trial courts could in the future feel empowered to dispense with proof of unfitness when terminating the parental rights of undocumented aliens, of persons suffering from certain feared diseases, of dying persons, of drug addicts or alcoholics, or the poor or homeless or those on welfare, of persons with certain physical handicaps, of the mentally ill, of homosexuals, or of the practitioners of certain religions.

Moreover, if allowed to stand the present decision would allow discrimination against children as well as their parents. In *Santosky v. Kramer*, *supra*, this Court recognized that parental termination proceedings have profound effects on

the rights of children as well as on those of their parents. Quoting a Colorado decision, the Court observed:

> "The child loses the right of support and maintenance, for which he may thereafter be dependent upon society; the right to inherit; and all other rights inherent in the legal parent-child relationship, not just for a limited period, but forever." 455 U.S. at 760, n. 11.

In his dissent in *Santosky*, Justice Rehnquist also recognized that "[t]he child has an interest in the outcome of the factfinding hearing independent of that of the parent." 455 U.S. at 788, n. 13.

If the present decision were allowed to stand, it would authorize discriminatory treatment not only of parents but also of their children. Where, as here, the state is not involved as a party to the termination proceedings and therefore lacks the opportunity to represent the best interests of the child, the ability of a vindictive parent to sever the entire relationship be - tween the child and the disfavored parent may depend on the particular prejudices of the court. In the present case, although Mary Daly had been taught to think of Suzanne as "dead" and stated her desire not to see her again, Mary at 9 years old was hardly in a position to understand all the ramifications of such a decision. Thus, the child of a parent of disfavored status is also vulnerable to the serious consequences of discriminatory severance of the parent-child relationship.

—CONCLUSION—

The trial below was not a fair adjudication of Suzanne Daly's right to remain a parent of Mary Daly. It was simply an impermissible appeal to prejudice grounded in innuendo and sensationalism. As a result, Suzanne Daly's fundamental right of parenthood was extinguished without due process of law. Similarly, the termination of this fundamental right is based solely on nothing more than Suzanne Daly's disfavored status as a former transsexual. Consideration of this status as the sole basis for the loss of Suzanne Daly's right to be a parent violates the Equal Protection Clause of the Fourteenth Amendment. The termination of Suzanne Daly's right must be reversed.

Respectfully submitted.

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